Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

October Term, 1975

No. 75-305

GRIGGS, COOPER & CO., INC.,
a Minnesota corporation,
*Intervenor-Appellant,*

vs.

JOSEPH NOVAK, Liquor Control Commissioner of Minnesota, and THE STATE OF MINNESOTA,
*Defendants-Respondents,*

FEDERAL DISTILLERS, INC., MR. BOSTON DISTILLERS CORPORATION and JOHNSON BROTHERS WHOLESALE LIQUOR COMPANY,
*Plaintiffs-Respondents,*

ED. PHILLIPS & SONS CO. and RAYMOND DISTRIBUTING COMPANY, INC.,
*Intervenors-Respondents.*

## JURISDICTIONAL STATEMENT FOR APPELLANT GRIGGS, COOPER & CO., INC.

LAWRENCE J. HAYES
JAMES A. GALLAGHER
WILLIAM J. HASSING
RICHARD M. GAALSWYK
MAUN, HAZEL, GREEN,
HAYES, SIMON & ARETZ
332 Hamm Building
St. Paul, Minnesota 55102
*Attorneys for Griggs, Cooper & Co., Inc.*

224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

## INDEX


| | PAGE |
|---|---|
| Opinion below | 2 |
| Jurisdiction | 2 |
| Questions presented | 2 |
| Statutes involved | 3 |
| Statement | 5 |
| A. Procedural history | 5 |
| B. Description of the appellant | 8 |
| C. General nature of the liquor industry in Minnesota | 8 |
| D. Impact of §340.114 | 12 |
| The questions are substantial | 13 |
| Conclusion | 31 |
| Appendix A | A-1 |
| Appendix B | A-26 |
| Appendix C | A-52 |
| Appendix D | A-68 |
| Appendix E | A-69 |

## CITATIONS


| | PAGE |
|---|---|
| *Cases:* | |
| Advance-Rumely Thresher Co., Inc. v. Jackson, 287 U.S. 283 (1932) | 20-21 |
| Bell v. Burson, 402 U.S. 535 (1971) | 16, 24 |
| California v. LaRue, 409 U.S. 109 (1972) | 13, 19 |
| Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974) | 15 |
| Connally v. General Const. Co., 269 U.S. 385 (1926) | 29 |
| Elder-Beerman Stores Corp. v. Federated Dept. Stores, Inc., 459 F.2d 138 (1972) | 21 |
| Federal Trade Commission v. Simplicity Pattern Co., Inc., 360 U.S. 55 (1959) | 30 |
| Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) | 22, 26 |
| Graham v. Richardson, 403 U.S. 365 (1971) | 24 |
| Hornsby v. Allen, 326 F.2d 605 (1964) | 19-20, 22 |
| Jordan v. DeGeorge, 341 U.S. 223 (1951) | 29 |
| Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (1969) | 21 |
| Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35 (1966) | 21 |
| Jay Burns Baking Co. v. Bryan, 264 U.S. 504 (1924) | 21-22 |
| Krause v. Sacramento Inn, 479 F.2d 988 (1973) | 18 |
| Lawton v. Steele, 152 U.S. 133 (1894) | 22 |
| Leary v. United States, 395 U.S. 6 (1969) | 16 |
| Parks v. Allen, 426 F.2d 610 (1970) | 20 |
| Republican College Council of Pennsylvania v. Winner, 357 F. Supp. 739 (1973) | 20 |





| | |
|---|---|
| Smith v. Goguen, 415 U.S. 566 (1974) | 28-29 |
| State v. County of St. Louis, 216 Minn. 140, 12 N.W.2d 193 (1943) | 30 |
| State v. Wittles, 118 Minn. 364, 136 N.W. 883 (1912) | 30 |
| Tot v. United States, 319 U.S. 463 (1943) | 16 |
| Turner v. United States, 396 U.S. 398 (1970) | 16 |
| Tyson & Bro. - United Theatre Ticket Offices v. Banton, 273 U.S. 418 (1927) | 17-18 |
| United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967) | 21 |
| United States v. Colgate & Co., 250 U.S. 300 (1919) | 21 |
| United States v. Frankfort Distilleries, 324 U.S. 293 (1945) | 18-19 |
| Vlandis v. Kline, 412 U.S. 441 (1973) | 15-16 |
| Wisconsin v. Constantineau, 400 U.S. 433 (1971) | 13, 19, 22 |
| Yu Cong Eng v. Trinidad, 271 U.S. 500 (1926) | 29 |
| Ziffrin, Inc. v. Reeves, 308 U.S. 132 (1939) | 22 |
| *Constitutional Provisions:* | |
| U.S. Const. Amend. V | 15 |
| U.S. Const. Amend. XIV | 14-15, 18, 21, 30 |
| U.S. Const. Amend. XXI | 18-20 |

*Statutes:*

Robinson - Patman Act §2(b), 15 U.S.C. §13 ..... 30
28 U.S.C. §1257(2) ..... 2
Minn. St. §340.11(2) ..... 8
Minn. St. §340.112(1) ..... 8
Minn. St. §340.114 ..... 2-8, 12-14, 16, 21-30
Minn. St. §340.19 ..... 4, 28
Minn. St. §340.62 ..... 28
Minn. St. §555.01 ..... 5

*Administrative Regulations:*

Minnesota Liquor Regulations §§71-78 ..... 28



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ED. PHILLIPS & SONS CO. and RAYMOND DISTRIBUTING COMPANY, INC.,
*Intervenors-Respondents.*

## JURISDICTIONAL STATEMENT FOR APPELLANT GRIGGS, COOPER & CO., INC.

## OPINION BELOW

The opinions of the Supreme Court of the State of Minnesota dated April 4, 1975 (App. A, *infra*, pp. 1-26), and May 2, 1975 (App. B, *infra*, pp. A-26-51), are not yet officially reported. The Findings of Fact, Conclusions of Law and Order for Judgment and Memorandum (App. C, *infra*, pp. A-52-67) of the Trial Court, the District Court, Second Judicial District, Ramsey County, Minnesota, are not officially reported.

## JURISDICTION

The judgment of the Supreme Court of Minnesota (App. D, *infra*, pp. A-68-69) was entered on June 3, 1975. A notice of Appeal to this Court on behalf of Griggs, Cooper & Co., Inc. (Griggs) (App. E, *infra*, pp. A-69-70) was filed with the Minnesota Supreme Court on June 3, 1975. The jurisdiction of this Court is conferred by 28 U.S.C. §1257(2).

## QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. Does Minn. Stat. §340.114 on its face represent an arbitrary and unreasonable exercise of the state's police power in violation of due process under the Constitution of the United States because it:

A. Employs an irrebuttable presumption?

B. Is overbroad and unconstitutionally inhibits liberty and property rights?

2. Does Minn. Stat. §340.114, as construed by the Minnesota Supreme Court, violate due process and equal protection rights conferred by the Constitution of the United States because it:



A. Arbitrarily and discriminatorily exempts distilled spirits marketed under brand labels owned by Minnesota wholesalers?

B. Is void for vagueness?

C. Embodies an unlawful delegation of legislative authority to an administrative agency?

## STATUTES INVOLVED

The principal statute involved in this litigation, Minn. Stat. §340.114 (1973), was enacted on May 24, 1973 by the Minnesota Legislature as part of Minnesota Laws, 1973, Chapter 664. That statute provides in pertinent part:

> "[340.114] [UNLAWFUL DISCRIMINATION PROHIBITED.] Subdivision 1. All licensed importers shall offer for sale on an equal basis to all licensed wholesalers and manufacturers all intoxicating liquor brought into the state of Minnesota.
>
> Subd. 2. Without limiting subdivision 1, the following shall be deemed failures to offer intoxicating liquor for sale on an equal basis and are unlawful:
>
> (a) A refusal to sell any intoxicating liquor to a wholesaler or manufacturer, which is offered for sale to any other wholesaler or manufacturer, except when a wholesaler or manufacturer is in arrears on payments for past purchases from the importer who refuses to sell.
>
> * * *
>
> (f) For purposes of this subdivision and subdivision 1 only, the term 'intoxicating liquor' shall not include 'pop wines' as the same are defined by regulation of the commissioner.
>
> * * *

Subd. 4. Nothing in this section shall apply to any wines or malt beverages regardless of alcoholic content."

The second statute involved in this litigation is Minn. Stat. §340.19 (1973). This statute prescribes the civil and criminal penalties for violations of the provisions of the Intoxicating Liquor Act, including Minn. Stat. §340.114, in part as follows:

"340.19 REMOVAL OF OFFICERS; LICENSES REVOKED; BONDS FORFEITED; VIOLATIONS.

* * *

(2) When any licensee shall wilfully violate the provisions of the intoxicating liquor act his license shall be immediately revoked and his bond forfeited, and no license of any class shall for a term of five years thereafter be issued to the same person or to any person who at the time of the violation owns any interest, whether as holder of more than five percent of the capital stock of a corporation licensee, as partner, or otherwise, in the premises or in the business conducted thereon, or to any corporation, partnership, association, enterprise, business, or firm in which any such person is in any manner interested.

* * *

(4) Whoever, in violation of the provisions of the intoxicating liquor act, shall transport or import into the state liquor for the purposes of sale shall be guilty of a gross misdemeanor.

* * *

(6)Whoever shall violate any of the provisions of the intoxicating liquor act as to sale, licensing, or any of the regulatory provisions pertaining thereto, as herein provided, shall be guilty of a misdemeanor.

(7) Whoever refuses or neglects to obey any lawful direction of the liquor control commissioner, or his deputy or any of his assistants . . . shall be guilty of a gross misdemeanor."



# STATEMENT

## A. Procedural History

This is a direct appeal from the judgment of the Supreme Court of Minnesota entered pursuant to an opinion of that Court dated May 2, 1975 in which it held that Section 340.114 does not violate the provisions of the United States and Minnesota Constitutions. (App. B., *infra*, pp. A-26-51)

In June 1973 Federal Distillers, Inc. (Federal), Mr. Boston Distiller Corporation (Boston), and Johnson Brothers Wholesale Liquor Company (Johnson), pursuant to Minn. Stat. §555.01 *et seq*, brought a declaratory judgment action in Ramsey County District Court against Joseph Novak, the Minnesota Liquor Control Commissioner, and the State of Minnesota requesting that Section 340.114 be declared unconstitutional. Ed. Phillips & Sons Co. (Phillips) and Griggs intervened as plaintiffs in that action, and Raymond Distributing Company (Raymond) intervened as a defendant. Three separate similar actions were brought against Commissioner Novak by Heaven Hill Distilleries, Inc. (Heaven Hill), Old Peoria, Inc. (Old Peoria), and National Distillers & Chemical Corporation (National Distillers).

Federal and Boston are manufacturers of distilled spirits located in Massachusetts who import distilled spirits into Minnesota (Tr. 128-29) Johnson is a Minnesota corporation licensed to sell intoxicating liquor products at wholesale in Minnesota. Many of its products are purchased from suppliers outside of Minnesota and are marketed in Minnesota under brand labels owned by Johnson. (Tr. 128-29) Phillips and Griggs are licensed to sell intoxicating liquor products at wholesale in Minnesota. Raymond held a wholesaler's license at the time of trial. Phillips also manufactures products in

Minnesota and markets them in Minnesota and elsewhere under brand labels owned by Phillips (Tr. 23-24, 76-77, 272-73, 307-12, 317-18, and 583) Heaven Hill and National Distillers are manufacturers of distilled spirits located outside Minnesota. They import products into Minnesota. (Tr. 278, 562-63, 571 and 574) Old Peoria is a Minnesota wholesaler of distilled spirits. (Tr. 509-10)

Heaven Hill Distilleries, Inc. is a small, family owned distillery that maintains its principal place of business in Kentucky. (Tr. 563) It is a Kentucky corporation and holds a license to import intoxicating liquor products into Minnesota. (Tr. 565) Since 1945 Heaven Hill has marketed its products in Minnesota through Old Peoria, a Minnesota wholesaler. (Tr. 563) Typically, Old Peoria has purchased Heaven Hill bulk whiskey. Heaven Hill bottles the bulk at the age and proof specified by Old Peoria and labels the products with brand labels owned by Heaven Hill. (Tr. 563-65) This method of marketing provides the wholesaler with product flexibility and provides the wholesaler with some degree of assurance that products will be available. (Tr. 585-86, 590) By the same token, this method of marketing renders Heaven Hill totally reliant upon the wholesaler's sponsorship and promotion of Heaven Hill brands. (Tr. 574-77)

The complaints variously alleged that Section 340.114 violates the due process and equal protection clauses of the United States and Minnnesota Constitutions, that it is overbroad and based on an erroneous irrebuttable presumption, that it deprives importers and wholesalers of their liberty and property without due process of law or just compensation, and that it arbitrarily discriminates in favor of Phillips and Johnson as the owners of brand labels of distilled spirits marketed in Minnesota.



These actions were consolidated and tried to the District Court commencing September 19, 1973. The Court issued its findings of fact, conclusions of law and order for judgment on December 7, 1973, and held, *inter alia*, that Section 340.114 is constitutional. (App. C, *infra*, pp. A-52-67) Post trial motions were subsequently denied by the trial court and appeals were taken to the Minnesota Supreme Court.

On April 4, 1975 the Minnesota Supreme Court issued its first opinion in this matter. (App. A, *infra*, pp. A-1-26) One Justice dissented. Petitions for rehearing were timely filed by Griggs and others, and in response thereto on May 2, 1975 the Minnesota Supreme Court withdrew its April 4 opinion and substituted its opinion dated May 2, 1975.

Timely petitions for rehearing asserting errors reflected in the May 2, 1975 opinion were filed. These petitions asserted, among other things, that Section 340.114 as construed is void for vagueness, that the Minnesota Supreme Court delegated or sanctioned an unlawful delegation of legislative authority to the Minnesota Liquor Control Commissioner, and that in an attempt to salvage the statute the Minnesota Supreme Court legislated undefined exceptions into the statute in excess of its authority. These petitions were denied by the Minnesota Supreme Court without comment on June 2, 1975. The instant appeals to this Court followed.

Enforcement of Section 340.114 was stayed while proceedings were pending in the Minnesota state courts. The Minnesota Supreme Court, by its order dated June 2, 1975, refused to continue the stay pending a determination of this appeal. A stay was denied by this Court on June 16, 1975.

### B. Description of the Appellant

Griggs, Cooper and Co., Inc. is a Minnesota corporation licensed to engage in the wholesale liquor business in Minnesota. (Tr. 230) Griggs has actively engaged in the business for many years. Griggs has not been a distributor of any of the nation's big four distillers (Seagrams, National, Schenley and Hiram Walker) during the past ten years (Tr. 228-29). Despite this fact, Griggs built a successful wholesale liquor business which at the time of trial employed 72 people, including 43 sales personnel. (Tr. 230, 253) Griggs serves as the Minnesota distributor for Fleischmann, Stitzel-Weller and Arrow products, having built its business over the years "stone on stone, block on block." (Tr. 224, 228-30, 253 and 355-56)

Griggs does not import or sell any distilled liquors under labels owned by Griggs. Nor does Griggs engage in any rectifying, blending or bottling of distilled liquor products. (Tr. 228, 363, and 401)

### C. General Nature of the Liquor Industry in Minnesota Prior to the Enactment of Section 340.114

Since the repeal of prohibition, the distilled spirits industry in Minnesota has been structured in a typical three-tier system: the manufacturer, the wholesaler, and the retailer. Manufacturers have typically been located outside of Minnesota and, pursuant to Minnesota Statutes § 340.113 (subd. 1), have been required to obtain Minnesota import licenses before importing products into Minnesota for resale to wholesalers.

Wholesalers have typically been Minnesota companies engaged only in the wholesale function. However, the wholesale license issued pursuant to Minn. Stat. § 340.11 (subd. 2) also authorizes a wholesaler to engage in manufacturing operations within the State. At the time of trial, one wholesaler, Phillips, was and long had been actively engaged in rectifying, blending and bottling intoxicating liquor products from bulk



spirits at its plant in Minneapolis, Minnesota. (Tr. 23-24, 76-77) Some products Phillips manufactures and sells in Minnesota under brand labels owned by Phillips occupy a prominent position in the Minnesota distilled spirits market. (Tr. 267-69)

Intoxicating liquor products are sold at retail in Minnesota at retail outlets operated by municipalities and by privately owned on and off sale outlets. The number of retail liquor licenses available in Minnesota is very limited. (Tr. 416-17, 437-39, 850-53) Minnesota retailers have also enjoyed freedom from strenuous competition because of severe limitations placed upon retail advertising. (Tr. 832-34, 949, 951)

Out of state manufacturers engage in business via three different methods. First, they may simply manufacture distilled spirits products, label the products with brand labels owned by them, and import these products into Minnesota for resale by a Minnesota wholesaler. National Distillers markets its products through Phillips in this manner. (Tr. 278) The second method of operation involves the sale of bulk distilled spirits to a Minnesota wholesaler. The wholesaler thereafter advises the manufacturer of the age and proof at which it wishes the spirits bottled. The manufacturer performs the bottling function, labels the spirits with brand labels owned by the manufacturer and imports the bottled spirits into Minnesota for resale by the wholesaler. Heaven Hill typically conducts its business in this manner. (Tr. 563-65) The third method involves rectifying, blending and bottling distilled spirits to specifications selected by a wholesaler and labeling the products with brand labels owned by the wholesaler. For example, Federal rectifies, blends and bottles intoxicating liquor products that are marketed in Minnesota under brand labels owned by Johnson. (Tr. 128-29; Norton Deposition 11-12, received Tr. 596)

Typically, out-of-state manufacturers have marketed their brand label products in Minnesota to only one Minnesota wholesaler. Manufacturers have learned from experience that use of a sole distributor is the most efficient and effective means of distributing their products in Minnesota. (Tr. 46, 163-64, 166, 213-14, 277-79, 574-77, 580-81 and 905-06) Similarly, Minnesota wholesalers that register brand labels for products they market in Minnesota, including Johnson and Phillips, are the sole wholesale distributors of products whose labels they own. (Tr. 63, 71-72, 116, 124 and 310-11)

A Minnesota wholesaler can reasonably expect to remain the sole wholesaler of a manufacturer-importer's products so long as it maintains its wholesale license, good credit, sufficient inventory, high sales volume and proper distribution. (Tr. 239, 251, 358-59, 370, 400-01, 409-12, 468, 572 and 594)

Although only one wholesaler handles each particular brand, there is an abundance of competitively priced equivalent brands available to retailers in Minnesota. (Tr. 145, 150-51, 153-54, 176-77, 180-82, 241-42, 246-48, 250-51, 289-97, 299-303, 376, 468-70, 516-18, 572-73, 607, 615-16, 628, 641-43, 745-47, 847-49 and 906-11) For example, 82 different scotches are available to Minnesota Wholesalers. (Phillips' Exhibit No. 2) Moreover, several thousand additional brands sold elsewhere in the United States are not distributed in Minnesota and are available for distribution there by wholesalers. (Tr. 91-92, 199, 465, 507 and 543)

Typically, brand name products achieve a position of prominence in the Minnesota market through individual promotional activity by the distributing wholesaler. Wholesalers market products through salesmen who call on virtually every retailer in the State on a regular basis. (Tr. 88, 150, 602, 615-16, 641-43, 713, 745-47 and 847) Wholesale salesmen make the markets for the products they handle through their promotional efforts and services. (Tr. 204, 230-33, 235, 247, 269, 280-85, 329-30, 336-48, 393-94, 499-500, 510-15, 847-48 and 906-07) For example, Griggs, Cooper built a successful business as the sole distributor of Fleischmann, Stitzel-Weller and Arrow products. (Tr. 224, 228-29, 355-56 and 371) Through Griggs's efforts, per capita sales of Fleischmann and Arrow products in Minnesota are higher per capita than sales for those products in any other state. (Tr. 232-33, 235 and 355-56) Similarly, because of Griggs's efforts, Minnesota sales of Cabin Still are four times greater than the national average. (Tr. 411-12)



When more than one wholesaler has handled a particular line of distilled spirits, the results have usually been adverse. During 1955-56, two wholesalers distributed Schenley products, two distributed Corby products, and two distributed Brown-Foreman products. The sales of all three lines suffered greatly under these dual distributorships. (Tr. 215)

Vigorous and intense price competition exists among all Minnesota wholesalers and among all of the brands distributed by each of them (Tr. 142, 176-77, 180-82, 221, 241-42, 246-48, 250-51, 289-97, 299-303, 332-35, 376, 468-70, 515-18, 572-73, 607, 615-16, 641-43, 745-47, 842, 847-49 and 906-11, Phillips' Exhibit No. 4)

As required by State law, Minnesota wholesalers regularly file price sheets and price discounts or deals with the Liquor Control Commissioner. (Tr. 181, 233, 240, 249-51, 292-303, 423, 573-74, 602-06, 641 and 848-49) Wholesalers also file amended price sheets within a specified period to meet or beat the prices of competitive products. (Tr. 233, 240-41, 250 and 298) Price sheets are available to other wholesalers and retailers for inspection. (Tr. 181, 249-50, 293 and 848) There is no agreement or cooperation among wholesalers on prices or

discounts, and importers do not determine, control, or influence the prices charged by wholesalers. (Tr. 84, 248, 251, 293-94, 403, 487, 541 and 574)

**D. Impact of Section 340.114**

The trial court record shows that the impact of Section 340.-114 on the wholesale liquor industry in Minnesota will be devastating and that it will eventually destroy the wholesale liquor industry as it has existed in Minnesota for many years.

On its face, Section 340.114 deprives importers of freedom to choose to whom they will sell their products. If an importer sells to one, he must sell to all Minnesota wholesalers, unless they are in arrears in payment for past purchases. There was ample testimony before the trial court that creation of these, in effect, non-cancellable distributorships would foster "footballing" (the sale of a brand label product at or below cost and the eventual destruction of the brand in the market place). (Tr. 398-99, 479-81 and 579-80; Norton Deposition 58 and 64-65) The statute also removes wholesaler incentive to promote and develop brands and to employ substantial sales forces to provide services to retailer customers. (Tr. 93, 101, 168-69, 246, 253, 364, 430-31, 474, 520-21, 587-88 and 913-14) The statute will have the ultimate effect of concentrating the wholesale level of distribution in a few wholesale establishments of sufficient economic means to stock huge inventories of major brands and to market them on a warehouse and telephone order basis.

An official of Heaven Hill testified that Heaven Hill's position in the market would "seriously deteriorate" if the company marketed through more than one wholesaler. (Tr. 575) He testified that product volume would be divided to such an extent that any one wholesaler's volume would not enable it to give Heaven Hill the support it requires. (Tr. 581)



The statute as construed by the Minnesota Supreme Court arbitrarily and discriminatorily fragments the liquor industry, by imposing civil and criminal sanctions on some sectors of the industry but not on others. For example, as construed the statute does not reach products labeled with brands registered by Minnesota wholesalers Phillips and Johnson but does reach products labeled with brands registered by out-of-state manufacturers. The Minnesota Supreme Court has so ruled, even though: (1) the products are manufactured in exactly the same fashion; (2) the products are actually manufactured in bulk outside of Minnesota and imported into Minnesota in finished or bulk form by out-of-state manufacturers; (3) both Phillips and Johnson, by virtue of their wholesale licenses, have the right to import products into Minnesota; and (4) the same registration requirements apply to all such products. As the statute is construed, Phillips and Johnson will continue to market their brand label products exclusively, while other manufacturer-importers owning their own labels and their established wholesalers are deprived of that right.

## THE QUESTIONS ARE SUBSTANTIAL

This appeal presents several questions involving a state's right under guise of police power to enact sweeping legislation restructuring traditional methods of doing business without regard to basic fourteenth amendment freedoms and protections.[1]

Among the central questions here is whether Section 340.-

[1] The fact that the liquor industry in Minnesota was singled out by the Minnesota Legislature in this case is not particularly significant. As repeatedly recognized by this Court and by the Minnesota Supreme Court in its decision here, fourteenth amendment standards control and cannot be invaded by the state under the guise of the twenty-first amendment. *See, e.g., Wisconsin v. Constantineau*, 400 U.S. 433 (1971); *California v. LaRue*, 409 U.S. 109 (1972).

114 violates basic due process freedoms because it is overbroad and is premised upon a conclusive presumption that a refusal by an importer to sell to a wholesaler has the necessary effect or necessarily was for the purpose of injuring intrabrand competition at the wholesale level. The Minnesota Supreme Court recognized that the statute is founded on such a presumption but specifically refused to rule that the presumption is either (a) not necessarily true in fact, or (b) that the presumption unreasonably or arbitrarily infringes on an importer's freedom of contract.

Other substantial questions arise, because the Minnesota Supreme Court, in an effort to uphold the statute, injected additional elements, thus gravely undermining its constitutionality. The Minnesota Supreme Court in its second opinion violated the boundary between judicial and legislative functions and, among other things, construed undefined exceptions into a statute that on its face allows only one exception, delegated or at least sanctioned the unlawful delegation of legislative authority to an administrative agency, and injected vagueness into the statute to the extent that those who face possible civil and criminal sanctions under it are not reasonably apprised of what conduct is prohibited and what conduct is authorized.

**1. The Conclusive Presumption Violates the Due Process Clause of the Fourteenth Amendment.**

Section 340.114 on its face provides that every refusal to offer to sell products to wholesalers, except in response to a particular wholesaler's failure to make timely payment, is unlawful. This declared illegality is based on the presumption that every refusal to sell is done with the intent to injure or has the effect of injuring intrabrand competition at the



wholesale level. This Court has often recognized that statutes creating conclusive presumptions are disfavored under the due process clauses of the fifth and fourteenth amendments. *See, e.g., Vlandis v. Kline*, 412 U.S. 441 (1973); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974).

In *LaFleur, supra*, this Court struck down school board regulations requiring every pregnant school teacher to take a maternity leave without pay beginning five months before the expected date of birth. The school board sought to justify its maternity leave regulations by arguing, *inter alia*, that at least some teachers became physically incapable of adequately performing certain of their duties during the latter part of pregnancy. Assuming *arguendo* that at least some teachers became physically disabled, the Court nevertheless stated:

> "But the question is whether the rules sweep too broadly. . . . That question must be answered in the affirmative, for the provisions amount to a conclusive presumption that every pregnant teacher who reaches the fifth or sixth month of pregnancy is physically incapable of continuing. There is no individualized determination by the teacher's doctor—or the school board's—as to any particular teacher's ability to continue at her job. The rules contain an irrebuttable presumption of physical incompetency, and that presumption applies even when the medical evidence as to an individual woman's physical status might be wholly to the contrary." [414 U.S. at 644]

In *Vlandis v. Kline, supra*, 412 U.S. at 452, the test applicable to presumptions was stated in the following terms:

> "[I]t is forbidden by the Due Process Clause to deny an individual the resident rates on the basis of a permanent and irrebuttable presumption of nonresidence, when that presumption is not necessarily or universally true in fact,

and when the State has reasonable alternative means of making the crucial determination."

See also *Bell v. Burson*, 402 U.S. 535 (1971), where this Court invalidated a provision of the Georgia Safety Responsibility Act which required an uninsured motorist to post security or lose his license following an accident, without providing a hearing on fault.

Section 340.114 creates criminal as well as civil liability for violations. When criminal liability may be established by a presumption, even though not conclusive, this Court has carefully analyzed the foundation for the presumption and has not been hesitant to declare the presumtpion invalid. *See, e.g. Turner v. United States*, 396 U.S. 398 (1970); *Leary v. United States*, 395 U.S. 6 (1969); *Tot v. United States*, 319 U.S. 463 (1943).

In accordance with these cases, the standard that should have been applied by the Minnesota Supreme Court and which should be applied by this Court is whether the presumption underlying Section 340.114 is "necessarily or universally true in fact" or whether the State of Minnesota has reasonable, alternative means of making the crucial determination of whether a particular refusal to sell adversely affects intrabrand competition at the wholesale level. *Vlandis v. Kline*, *supra*, 412 U.S. at 452.

The evidence at the trial clearly indicates that importers have a number of reasons unrelated to intrabrand competition for refusing to deal with a particular wholesaler. For example, an importer might decide that a particular wholesaler's poor business record for promoting brands indicates the wholesaler is not likely to contribute to the importer's success in enlarging distribution of its brand (Tr. 479). A particular wholesaler may have an unsavory business reputation, and an



importer for that reason might prefer not to have its brands distributed by that wholesaler (Tr. 481). Because a wholesaler may be owned by a competing manufacturer-importer, an importer might wish to avoid the possible "footballing" of its products and decide not to deal with that wholesaler (T. 398-400, 475-76, 480). Yet none of these valid business reasons for refusing to offer to sell are recognized as exceptions by the statute.

The Minnesota Supreme Court purportedly refused to rule that the statutory presumption was not necessarily true in fact; the Court felt constrained to review the statute only on its face and without regard to testimony received at trial. Nevertheless, that Court in fact recognized that the *presumption is not true in all cases*. Significantly, in footnote 20 of the Court's May 2, 1975 opinion, it stated:

". . . [W]e do not intimate that a legislative statute by presuming rather than proving may foreclose a distiller charged with a violation from interposing as a defense that his refusal to deal was occasioned by circumstances unrelated to predatory discrimination but occurred for valid reasons, such as a wholesaler's adulteration of a distiller's product or false branding or other like illegal or tortious conduct. Any enforcement of the act by regulations which would employ an irrebuttable presumption is constitutionally offensive to due process as held by Cleveland Board of Education v. LaFleur, 414 U.S. 632, 94 S.Ct. 791, 39 L.ed. 2d 52 (1974); and Twin City Candy & Tobacco Co. Inc. v. A. Weisman Co. 276 Minn. 225, 149 N.W.2d 698 (1967), and will, we assume, be avoided."

As stated by this Court in *Tyson & Bro.—United Theatre Ticket Offices v. Banton*, 273 U.S. 418, 443 (1927):

". . . It is not permissible to enact a law which, in effect, spreads an all-inclusive net for the feet of everybody upon

the chance that, while the innocent will surely be entangled in its meshes, some wrongdoers also may be caught."

**2. The Statute Is Overbroad and Constitutes Arbitrary Interference With Business.**

Another fundamental issue involves the right to be free from unreasonable, arbitrary, or capricious interference in the conduct of a business. This right has two distint dimensions. The first is to be free from arbitrary interference as a result of a statute, which, although enacted for a proper purpose, is overbroad and encompasses innocent as well as predatory conduct. The second dimension is to be free of legislation that bears no reasonable relation to a legislative purpose or that is so onerous as to deprive a person of a right without due process or just compensation.

It is clear that these fourteenth amendment due process rights exist despite the twenty-first amendment and the power conferred upon the states by that amendment. While the twenty-first amendment may vest absolute power in the states to prohibit the importation of liquor, it does not vest the states with unlimited power to regulate the sale and use of liquor within their boundaries. Once a state allows liquor to be imported and allows it to be marketed within its borders, the state's powers to regulate the liquor industry must abide other constitutional principles.

The mere fact that a statute may be reasonable under the twenty-first amendment does not mean that it is reasonable for all purposes. *Krause v. Sacramento Inn*, 479 F.2d 988, 989 (9th Cir. 1973).

This Court in *United States v. Frankfort Distilleries*, 324 U.S. 293 (1945), recognized that the power given to states



under the twenty-first amendment is not plenary and exclusive. In *California v. LaRue*, 409 U.S. 109, 120n (1972), Mr. Justice Stewart (concurring), citing *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), stated:

> "This is not to say that the Twenty-first Amendment empowers a State to act with total irrationality or invidious discrimination in controlling the distribution and dispensation of liquor within its borders."

Similarly, Mr. Justice Rehnquist recognized in the same case that the twenty-first amendmant does not supersede all other provisions of the United States Constitution in the area of liquor regulation. Analyzing previous Supreme Court decisions dealing with the twenty-first amendment, he concluded:

> "These decisions did not go so far as to hold or say that the Twenty-first Amendment supersedes all other provisions of the United States Constitution in the area of liquor regulations." (409 U.S. at 115)

See *Hornsby v. Allen*, 326 F.2d 605, 609 (5th Cir. 1964), *reh. denied*, 330 F.2d 55, where the Court said:

> "[S]tates do not escape the operation of the 14th Amendment in dealing with intoxicating beverages by reason of the 21st Amendment. Section 2 of that Amendment deals with the transportation or importation of liquors into a state or territory. Thus, although a state may, under the 21st Amendment, discriminate against imports of intoxicating beverages, see State Board of Equalization of California v. Young's Mkt. Co., 299 U.S. 59, 57 S.Ct. 77, 81 L.Ed. 38 (1936), the Amendment does not confer any other powers, see Sancho v. Corona Brewing Corp., 89 F.2d 479 (1st Cir. 1973). '[T]he Twenty-First Amendment did not clothe the State's right to control the sale

of liquor with any higher degree than it had over the sale of other commodities within the State.' Brown v. Jatros, 55 F.Supp. 542, 544 (E.D. Mich. 1944)."

* * *

". . . The potential social undesirability of the product may warrant absolutely prohibiting it, or . . . imposing restrictions to protect the community from its harmful influences. *But the dangers do not justify depriving those who deal in liquor, or seek to deal in it, of the customary constitutional safeguards.* Indeed, the great social interest in the liquor industry makes an exceptionally strong case for adherence to proper procedures and access to judicial review. . . ." (Emphasis supplied.)

See also, *Parks v. Allen*, 426 F.2d 610 (5th Cir. 1970), and *Republican College Council of Pennsylvania v. Winner*, 357 F.Supp. 739 (E.D. Pa. 1973).

Evidently, therefore, this Court and inferior courts have held that the twenty-first amendment does not eliminate the constitutional rights and protections otherwise available to those engaged in the distribution and sale of intoxicating liquors.

### A. The Right to Refuse to Deal

One of the elementary rights implicit in any marketing arrangement for any product is the due process right to refuse to deal with another person. In *Advance-Rumely Thresher Co., Inc. v. Jackson*, 287 U.S. 283, 288 (1932), this Court stated:

"While that right is a part of the liberty protected by the due process clause, it is subject to such restraints as the state in the exertion of its police power reasonably may put upon it. But freedom of contract is the general rule



and restraint the exception. The exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances."

See also, *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

Exercising the right to refuse to deal is not a violation of the antitrust laws of the United States unless there results a foreclosure of market alternatives. See *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967); *Elder-Beerman Stores Corp. v. Federated Dept. Stores, Inc.*, 459 F.2d 138 (6th Cir. 1972). It is clear under the federal antitrust laws that liquor manufacturers may deal exclusively with selected wholesale distributors where equivalent products are available on the market. *Joseph E. Seagram and Sons, Inc. v. Hawaiian Oke and Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1972). Indeed, this has been an established, recognized commercial practice in the liquor industry. *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966).

Section 340.114 on its face absolutely destroys this fundamental right to refuse to deal and in effect creates compulsory non-terminable franchises for every licensed wholesaler in Minnesota. If an importer sells its product to one wholesaler in Minnesota, it must offer to sell its product to all wholesalers, notwithstanding the existence of valid business reasons for not doing so. In this respect, Section 340.114 goes beyond any legitimate purpose and is overbroad.

If a statute is overbroad and goes beyond proper police power purposes, it clashes with rights protected by the fourteenth amendment to the United States Constitution, and the statute must fall. As stated in *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, 513 (1924):

". . . [A] state may not, under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them."

**B. Section 340.114 Is Not Reasonably Related to a Proper Legislative Purpose.**

In light of the facts proved at trial, there is no reasonable relationship between the avowed legislative purpose for Section 340.114 and its directive that every licensed importer of distilled spirits must offer its products for sale on an equal basis to every licensed wholesaler. Such a relationship is indispensable. *Wisconsin v. Constantineau, supra; Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939); *Hornsby v. Allen, supra.*

In *Lawton v. Steele*, 152 U.S. 133, 137 (1894), this Court stated the controlling principles as follows:

"To justify the state in thus interposing its authority in behalf of the public, it must appear—First, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. . . ."

Sixty-eight years later, this Court in *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962), stated without dissent that the classic rule stated in *Lawton v. Steele* "is still valid today."

Thus, to evaluate the reasonableness of Section 340.114, this Court should examine the nature of the purported menace



against which the statute is supposed to protect, the availability and effectiveness of other less drastic means of achieving a valid public purpose, and the loss which licensed liquor importers and wholesalers will suffer from enforcement of the statute.

The ostensible purpose urged to justify the harsh restrictions imposed by Section 340.114 is the benefit which would allegedly accrue to the consuming public if retail liquor prices are reduced as a result of intrabrand competition at the wholesale level. Despite some speculation that retail liquor prices might be reduced temporarily, the record as a whole overwhelmingly shows that there is no guarantee or assurance whatsoever, nor any reasonable basis upon which to conclude, that Section 340.114 will result in lower retail liquor prices (Tr. 95-96, 140, 194, 253-54, 315-17, 477, 500-02, 528-29 and 692-94). In fact, the District Court specifically refused to make any findings regarding the claimed benefits to the Minnesota public as a result of competition among wholesalers which theoretically might occur. The trial record reveals that liquor retailers have rarely passed on to consumers lower prices which the retailers have received in the past (Tr. 106-09, 529, 623-25, 629-30); wholesalers' markups are already very low (Tr. 887-89, Phillips Ex. 7); and retailers' markups are extremely high (Tr. 867, 887-89, Phillips Ex. 7). Furthermore, the number of retailers permitted to operate in Minnesota is limited and smaller per capita than in other states; and price advertising by retailers is narrowly circumscribed in Minnesota (Tr. 416-17, 437-39, 832-34, 850-53, 949 and 951). Thus, the true beneficiaries of any increased competition among Minnesota wholesalers will be liquor retailers, a private interest group, rather than Minnesota consumers. The record supplies no reasonable basis upon which to conclude

that Section 340.114 will accomplish any legitimate public purpose.

Secondly, the negative impact of Section 340.114 upon importers and wholesalers is devastating. Their businesses are being destroyed. Those businesses have in most cases been established only after years of toil and in reliance upon licenses regularly issued by the State of Minnesota. Although the Minnesota Supreme Court in this case has held that no one can acquire a "vested right" to continue to engage in the liquor business (App. B., *infra*, p. A-39), whether continuing in the business is characterized as a right or a mere privilege is not constitutionally significant. As stated by the Court in *Bell v. Burson*, 402 U.S. 535, 539 (1971):

> "If the statute barred the issuance of licenses to all motorists who did not carry liability insurance or who did not post security, the statute would not, under our cases, violate the Fourteenth Amendment. . . . Once licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment. . . . This is but an application of the general proposition that relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a 'right' or a 'privilege.' "

*Accord, Graham v. Richardson*, 403 U.S. 365, 374 (1971). The State cannot terminate the Appellant's "entitlement" to continue in business through passage of a statute such as Section 340.114.



It is undisputed that at the time of trial, and for the prior forty years, each liquor importer generally selected only one wholesaler to distribute its products in Minnesota. Experience has proven this system to be the most efficient and effective way to secure satisfactory distribution, promotion and sales volume throughout the state. Prior to the enactment of Section 340.114 wholesalers could reasonably expect to remain sole distributors, so long as they maintained their licenses and promoted and distributed the products they handled.

Based on this expectancy, many Minnesota wholesalers have invested much time, money, and effort in building large, efficient, and competent sales forces for the purpose of selling those brands which they respectively distribute (Tr. 247, 253, 279-80, 316 and 393-94); they have made large investments in warehouses and office space, in addition to investing two million dollars or more in large inventories (Tr. 234, 252, 279-80, 315-17 and 414-15). In excess of $4,000,000.00 in capital was invested in Griggs at the time of trial (Tr. 357). The market value of Phillips's wholesale facilities was $3,500,000.00 at the time of trial, plus $500,000.00 for its rectifying equipment (Tr. 279). More than $4,000,000.00 was paid for the assets of Distillers Distributing Co., another Minnesota wholesaler, in 1970 (Tr. 367-68 and 395-96). This purchase would never have been made had the drastic changes in Section 340.114 been envisioned (Tr. 370). Section 340.114 will adversely affect Griggs and many other Minnesota wholesalers so as to directly and substantially invade the property rights of those companies and their stockholders. This invasion will deprive them of the practical use and enjoyment of their property and result in a definite, measurable diminution of the market value of that property without just compensation.

Enforcement of Section 340.114 will destroy certain liquor

importers' valuable rights under the trade name, trademark, and patent laws and likewise vitiate their constitutional rights. Liquor importers have natural and complete legal control of their own products which they are free to exploit by selling through only one wholesaler if they wish. Section 340.114 destroys each importer's control and freedom of contract without due process of law or just compensation.

Section 340.114 will destroy the wholesalers' constitutional rights arising out of their relationships with liquor retailers. By forcing wholesalers to cut their sales staffs and become mere order-takers or mail order houses, Section 340.114 will destroy the good will built up by wholesalers with their retail customers through years of service, including assistance with point-of-sale promotional materials, floor displays, and shelf arrangements. Under Section 340.114, no wholesaler will have the incentive to continue servicing retail customers as in the past, because another wholesaler may write orders for sales promoted by the servicing wholesaler. The higher operating expenses of a wholesaler providing service could enable other wholesalers to write orders at lower prices than the servicing wholesaler could afford.

While Section 340.114 does not on its face deprive an existing importer or wholesaler of its license to continue in the liquor business, the impact of Section 340.114 may be just as devastating. It is well recognized that onerous regulation and interference with one's business may ". . . constitute a taking which constitutionally requires compensation." *Goldblatt v. Town of Hempstead, supra,* 369 U.S. at 594.



**3. Section 340.114 as Construed by the Minnesota Supreme Court to Exclude Products Imported Into Minnesota Under Brand Labels Owned by Minnesota Wholesalers Violates Equal Protection.**

It was urged at trial that the statute on its face makes no exceptions for these so-called private brands; and, because it does not, the statute invades specific property interests of the private brand holders. It was also urged that if the statute is construed to exclude private brands, the statute would reflect an arbitrary and discriminatory classification. The trial court refused to reach this question, and the Minnesota Supreme Court characterized it as "speculative and hypothetical" as to Johnson brands, stating:

> "There is no indication that the liquor commissioner is about to construe the statute in such a way as to invade Johnson's right of ownership in its registered private-brand labels, and the statute on its face clearly does not require such a construction." (App. B, *infra,* p. A-40)

With regard to Phillips, a company that manufactures distilled spirits in Minnesota and sells them in Minnesota and elsewhere under Phillips's labels, the trial court held, and the Minnesota Supreme Court affirmed, that Phillips is an "importer" within the meaning of the statute. However, the Court went on to state, almost certainly with reference to Phillips's brands, that ". . . there is no indication that the commissioner is inclined to adopt regulations which would render unconstitutional the enforcement of the act." (App. A., *infra,* p. A-41)

The crux of the matter is that although the statute on its face applies to "all licensed importers" and to "all intoxicating liquor brought into the State of Minnesota" (Section 340.114), the statute as interpreted does not apply to a wholesaler of a particular imported product, the label of which is owned and registered by a *Minnesota* company such as Johnson or Phillips.

The distinction drawn between imported products bearing labels registered by out-of-state importers and those owned and registered by Minnesota based importers or wholesalers has no rational basis in fact. The same statutory and regulatory criteria apply to *all* brand labels in Minnesota. Minn. Stat. §340.62, Minnesota Liquor Regulations 71-78.

The unreasonableness of the classification is manifest in the contrasting manner in which the statute affects Federal and Heaven Hill. Federal manufactures distilled spirits in Massachusetts. It bottles products to Johnson's specifications, labels the products with labels owned and provided by Johnson, and imports the products to Johnson in Minnesota. According to the Minnesota Supreme Court, those products are outside the ambit of the statute.

Heaven Hill, on the other hand, manufactures distilled spirits in Kentucky, bottles the products according to Old Peoria's specifications, labels the products with Heaven Hills's own labels, and imports the products into Minnesota for Old Peoria. These products, according to the Minnesota Supreme Court, are within the ambit of the statute, and Heaven Hill must offer these products to all wholesalers.

**4. The Minnesota Supreme Court, in an Effort to Preserve Section 340.114, Has Injected an Element of Vagueness Into the Statute That Further Undermines Its Constitutionality.**

Section 340.114, in light of Section 340.19, is both a civil and criminal statute. As such, as a matter of constitutional principle, it must incorporate fair notice or warning as to what conduct is proscribed or permitted. The recognized rule is:

> " 'No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.' "



> " '. . . [A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.' " (*Smith v. Goguen*, 415 U.S. 566, 572 n. 8 [1974])

Similarly, as stated in *Jordan v. DeGeorge*, 341 U.S. 223, 231-32 (1951):

> "The test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices."

The doctrine of vagueness also ". . . requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent 'arbitrary and discriminatory enforcement.' " *Smith, supra*, 415 U.S. at 572-73.

It is clear that a court may not inject an element of vagueness into a statute in order to save the law from conflict with one or more constitutional provisions. *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 518 (1926).

Because of the construction placed upon Section 340.114 by the Minnesota Supreme Court, especially by virtue of footnote 20 of the May 2, 1975 opinion, importers and wholesalers (who possess the right to import under their wholesale licenses) now are required to speculate as to the legality of their conduct. They risk license revocation and criminal prosecution in so doing. A statute that on its face or as construed injects such uncertainty into the criminal process clearly offends due process and equal protection of the laws. *See, Yu Cong Eng, supra; Connally v. General Const. Co.*, 269 U.S. 385 (1926).

**5. Under the Guise of Construction, the Minnesota Supreme Court Has Amended the Statute in Violation of Fundamental Principles of Separation of Powers and the Fourteenth Amendment of the United States Constitution.**

Courts are not free to disregard their judicial function and openly enter the legislative arena. This truism applies to the Minnesota Supreme Court, *State v. Wittles*, 118 Minn. 364, 136 N.W. 883 (1912); *State v. County of St. Louis*, 216 Minn. 140, 12 N.W.2d 193 (1943), as well as the federal courts. This principle was applied in *Federal Trade Commission v. Simplicity Pattern Co., Inc.*, 360 U.S. 55, 67 (1959), where this Court refused to extend the "justification" defense contained in Section 2(b) of the Robinson-Patman Act to apply to discrimination in services and facilities, stating:

> "[T]he only escape Congress has provided for discriminations in services or facilities is the permission to meet competition as found in the §2(b) proviso. We cannot supply what Congress has studiously omitted." 360 U.S. at 67.

Yet the Minnesota Supreme Court in this case apparently disregarded the clear language of Section 340.114 and construed, or at least directed regulatory authorities to construe, exceptions into the statute. See App. B, *infra*, p. A-51 n. 20. The Minnesota Supreme Court's right to do so in order to "cure" a constitutional infirmity present on the face of Section 340.114 raises a substantial question that warrants plenary consideration by this Court.



## CONCLUSION

For all of the reasons herein given this Court should accept jurisdiction of this appeal.

Respectfully submitted,

LAWRENCE J. HAYES
JAMES A. GALLAGHER
WILLIAM J. HASSING
RICHARD M. GAALSWYK
MAUN, HAZEL, GREEN,
HAYES, SIMON & ARETZ
332 Hamm Building
St. Paul, Minnesota 55102
*Attorneys for Griggs, Cooper & Co., Inc.*

# APPENDIX

## APPENDIX EXHIBIT A

Cal. No. 209 1/2 Ramsey County

Rogosheske, J.,
Concurring in part,
dissenting in part, Otis, J.
Took no part, Sheran, C.J.

Endorsed
Filed April 4, 1975
John McCarthy, Clerk
Minnesota Supreme Court

Federal Distillers, Inc., et al.,
*Respondents-Appellants,*

vs. 44831, 44837, 44844

State of Minnesota and Joseph Novak,
Liquor Control Commissioner of Minnesota,
*Respondents,*

Ed Phillips & Sons Co., intervenor,
*Appellant-Respondent,*

Griggs, Cooper & Co., Inc., intervenor,
*Respondent-Appellant,*

Raymond Distributing Co., Inc., intervenor,
*Respondent.*

and

Old Peoria Company, Inc., Heaven Hill Distilleries,
Inc., and National Distillers & Chemical Corporation,
*Appellants,*

vs. 44832, 44833, 44834
Joseph Novak, Liquor Control Commissioner
of Minnesota,

*Respondent.*

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SYLLABUS

Upon plaintiffs' appeal in actions for declaratory judgment and injunctive relief challenging the trial court's decision interpreting and upholding the facial constitutionality of provisions of L. 1973, c. 664 (now coded as Minn. St. 340.114), an amendment to the Intoxicating Liquor Act designed to prohibit exclusive wholesale dealerships by regulating the distribution and sale of liquor by licensed distillers and wholesalers to promote economic goals, *held*,

a. That the trial court's interpretation of the act to include plaintiff Ed Phillips & Sons Company, a licensed wholesaler and manufacturer, within the classification of a "licensed importer" is reasonable; is consistent with its factual findings, the language of the act, and the intent of the legislature; and is required under the rule of presumed constitutionality of a legislative act against a claimed denial of equal protection by other licensed wholesalers.

b. The act does not on its face transgress constitutionally-protected private or property rights of presently licensed Minnesota wholesalers, for the Twenty-First Amendment to the Federal Constitution empowers the states through the exercise of police power to entirely prohibit or broadly regulate the importation, distribution, and sale of liquor, and a wholesaler's license is not a vested right but a privilege subject to such regulations.

c. The claim by plaintiff Johnson Brothers Wholesale Liquor Company that the act requires the sale to all other



wholesalers of liquor bottled under registered, private brands owned by them is hypothetical, for there is no threatened construction or enforcement which would invade such ownership and the act on its face does not require such construction.

d. The act's failure to include in its regulation wines and malt beverages similarly distributed and sold in this state does not constitute an invidious discrimination in violation of equal-protection guarantees.

e. The provisions of the act which require every licensed distiller to sell his manufactured product at no higher than the lowest price offered elsewhere in the United States and make it unlawful for every distiller who chooses to offer his product to one licensed wholesaler to refuse to deal with other Minnesota wholesalers on an equal basis is a valid exercise of the state police power, since it constitutes a reasonable legislative determination to abolish the existing system of exclusive wholesale dealerships which portend monopolistic practices, inevitably limit competition, and ultimately affect consumer prices, and prohibiting such refusals to deal by distillers bears a rational relation to the promotion of the economic welfare of the public.

f. The provisions of the act classifying every distiller's refusal to deal above described except for "arrears in payment for past purchases" as discriminatory is neither overbroad nor amounts to the employment of a constitutionally impermissible presumption violative of due process, as it constitutes a reasonable determination peculiarly within the knowledge and experience of legislators that every prohibited refusal to deal necessarily frustrates achieving the economic goals sought and does not unreasonably interfere with a distiller's legitimate marketing rights and opportunities in this state.

Affirmed.

Considered and decided by the court en banc.

OPINION

ROGOSHESKE, Justice.

This appeal challenges the constitutionality of L. 1973, c. 664, § 2, now coded as Minn. St. 340.114, an amendment to Minnesota's Intoxicating Liquor Act requiring all licensed importers (distillers) of liquor to offer their products for sale to all Minnesota liquor wholesalers on an equal basis.[1] The

[1] Minn. St. 340.114 (L. 1973, c. 664, § 2) provides: "Subdivision 1. All licensed importers shall offer for sale on an equal basis to all licensed wholesalers and manufacturers all intoxicating liquor brought into the state of Minnesota.

"Subd. 2. Without limiting subdivision 1, the fol'owing shall be deemed failures to offer intoxicating liquor for sale on an equal basis and are unlawful:

(a) A refusal to sell any intoxicating liquor to a wholesaler or or manufacturer, which is offered for sale to any other wholesaler or manufacturer, except when a wholesaler or manufacturer is in arrears on payments for past purchases from the importer who refuses to sell.

(b) A sale of any intoxicating liquor to any wholesaler or manufacturer at a price different from that offered to any other wholesaler or manufacturer, exclusive of shipping costs, except that quantity discounts based upon actual cost savings may be uniformly offered to all wholesalers and manufacturers.

(c) A sale of any intoxicating liquor to any wholesaler or manufactuer on terms of purchase different from those offered any other wholesaler or manuacturer, except that when the importer reasonably believes that a wholesaler or manufacturer will be unable to comply with the existing terms of credit, then other terms may be employed, including denial of credit.

(d) Any discrimination among wholesalers and manufacturers in satisfying their respective demands for any intoxicating liquor.

(e) A sale conditioned upon an agreement which restricts the wholesaler or manufacturer with respect to customers, area for distribution, or resale price, or which otherwise restrains the wholesaler or manufacturer from competing in trade and commerce.

(f) For purposes of this subdivision and subdivision 1 only, the term 'intoxicating liquor' shall not include 'pop wines' as the same are defined by regulation of the commissioner.

"Subd. 3. No licensed importer or manufacturer shall offer or sell to any licensed wholesaler any intoxicating liquor at a bottle or case price which is higher than the lowest price at which such item of liquor is contemporaneously being sold by such importer or manufacturer to any wholesaler anywhere in any other state of the United States or in the District of Columbia or to any state or state agency which owns and operates retail liquor stores.

"In determining the lowest price for which any item of liquor is being sold in any other state or in the District of Columbia, or to any state or state agency which owns and operates retail liquor stores, appropriate reductions shall be made to reflect all discounts, rebates, free goods, allowances and other inducements of any kind whatsoever offered or given to any such wholesaler, state or state agency purchasing such item in such other state or in the District of Columbia; provided that nothing contained herein shall prevent differentials in price which make only due allowance for differences in state taxes and fees, and in the actual cost of delivery. As used in this subdivision, the term 'state taxes or fees' shall mean the excise taxes imposed or the fees required by any state or the District of Columbia based upon a gallon of liquor.

"Subd. 4. Nothing in this section shall apply to any wines or malt beverages regardless of alcoholic content."

The portions of the statute particularly challenged here are subds. 1, 2(a), and 4.

Minn. St. 340.19 makes a violation of any provision of the Intoxicating Liquor Act a misdemeanor.



court below found the statute constitutional in all respects. As we find c. 664 to be a valid exercise of the state's police power to promote the public's economic welfare, and that plaintiffs, licensed distillers and wholesalers of liquor, have failed to establish that any provisions of the act on their face transgress constitutionally protected private or property rights, we affirm.

These cases seeking declaratory judgment and injunctive relief were commenced in June and July of 1973 by the various plaintiffs, all of whom are involved in the distribution of liquor in Minnesota. By order of the Ramsey County District Court the cases were consolidated for trial, and enforcement of the statute was temporarily restrained. The matter was tried to the court without a jury in September 1973. The trial court held that the statute is neither an improper exercise of police power, overbroad in operation, nor in violation of the constitutional guarantees of due process and equal protection. Plaintiffs moved the court for amended findings of fact and

conclusions of law or for a new trial. The trial judge denied the motions, and plaintiffs appeal from those denials. Upon plaintiffs' motion, this court continued the restraint on enforcement of the statute pending decision on appeal.

Plaintiffs fall generally into two categories: (1) "Distillers," or corporations licensed as importers under § 340.113[2] which manufacture, rectify, blend, bottle, and label liquor which is sold to wholesale distributors in Minnesota; and (2) "wholesalers," or Minnesota corporations licensed under § 340.11, subd. 2,[3] to sell liquor at wholesale in Minnesota. The distillers include:

1. Federal Distillers, Inc., a Massachusetts corporation, which sells its brands of distilled spirits only to Johnson Brothers Wholesale Liquor Company (Johnson). Some of its manufactured products are bottled and labeled under brands owned by Federal and some are labeled under brands owned by Johnson.

2. Mr. Boston Distiller Corporation, a Massachusetts corporation, which bottles distilled spirits under brands owned

[2] There are at present approximately 150 holders of licenses under § 340.113, which provides in part: "Subdivision 1. No intoxicating liquor or ethyl alcohol shall be shipped into this state by any distiller, rectifier, winer, or wholesale distributor, or any other person, to any licensed Minnesota manufacturer or wholesale dealer unless and until such distiller, rectifier, winer, wholesale distributor, or such other person has secured a license from the liquor control commissioner permitting him so to do."

[3] There are at present 10 holders of wholesaler's licenses under § 340.11, which provides in pertinent part: "Subdivision 1. It shall be unlawful for any person, directly or indirectly, upon any pretense or by any device, to manufacture, import, sell, exchange, barter, dispose of, or keep for sale any intoxicating liquor without first having obtained a license therefor. * * *

"Subd. 2. Manufacturers' and wholesalers' licenses shall be issued by the liquor control commissioner.

"A manufacturer's or wholesaler's license shall include the right to import. The business of manufacturer and wholesaler may be combined and carried on under one license issued therefor."



by Johnson and under brands owned by Mr. Boston. Mr. Boston sells such brands only to Johnson in Minnesota.

3. National Distillers & Chemical Corporation, a Kentucky corporation, which sells its branded liquor and wines only to Ed Phillips & Sons in Minnesota.

4. Heaven Hill Distillers, Inc., a Kentucky corporation, which sells its liquors to Old Peoria Company, Inc., under brands owned by Heaven Hill.

The second group of plaintiffs, the wholesalers which sell to licensed retailers, includes:

1. Johnson Brothers Wholesale Liquor Company, which deals in liquor and wine and owns registered private-brand labels under which liquor is distilled for it by Federal and Mr. Boston.

2. Old Peoria Company, Inc., which sells both liquor and wine.

3. Griggs, Cooper and Company, Inc., which distributes and sells both wine and liquor.

4. Ed Phillips & Sons Company (Phillips), a Minnesota corporation licensed under § 340.113 and carrying on importation, manufacturing, and wholesaling operations under that license. Phillips imports bulk whiskey, which it then rectifies, blends, bottles, and labels with its own registered brand labels. Phillips sells these branded products to retailers in Minnesota and to wholesalers in other states. Phillips also purchases liquor from National and other distillers outside of Minnesota and sells that liquor to Minnesota retailers as the sole wholesale outlet.

Named defendants include the State of Minnesota and Joseph Novak, the liquor control commissioner. Raymond Distributing Company, Inc., which intervened as a defendant, is a Minnesota wholesaler, licensed in May 1973. Raymond has

unsuccessfully attempted to purchase certain established brands of intoxicating liquors from some out-of-state distillers and, although it could apparently purchase some unknown or lesser-established brands of intoxicating liquor, it has not commenced business.

Chapter 664, essentially designed to abolish exclusive wholesale distribution of liquor and thereby to promote price competition by seeking to eliminate actual or potential monopolistic practices and price fixing by distillers and wholesalers, adds another page to the long history of legislative regulation of liquor in Minnesota. The most recent thorough revision of the liquor laws occurred in 1967 with the passage of the Intoxicating Liquor Act.[4] That act, together with the earlier regulatory and licensing statutes, has in large measure dictated the pattern of the present system of liquor distribution to Minnesota consumers. In general, that system is three-tiered, consisting of the distiller (also referred to as a manufacturer in our statutes), the wholesaler, and the retailer, each of whom carries on his activities under licenses and various prohibitions of the statutory scheme established by Minn. St. c. 340 and regulations promulgated by the liquor control commissioner. Beginning in 1951, the major effort by the legislature to impose economic regulations to affect the price of liquor was the so-called "fair trade" law. Its design and purpose was declared to be to promote temperance and eliminate "price wars," which the legislature determined unduly stimulated the sale and consumption of alcoholic beverages.[5] Under this law, wholesalers or brand owners were required to file minimum consumer retail prices for each brand sold to re-

[4] L. 1967, c. 19 (Minn. St. c. 340). See Historical Note preceding c. 340 at 22 M. S. A. p. 9.
[5] Minn. St. 1971, §§ 340.97 to 340.978.



tailers, and the latter were prohibited from selling to consumers for less than the filed price. In 1969, and again in 1971, enforcement of this law was suspended, presumably because of a legislative determination that the price of liquor neither significantly deterred consumption nor promoted temperance. A Liquor Study Commission, created in 1971, confirmed in part that determination by finding that the 1969 moratorium of the fair trade law increased competition and resulted in lower prices to the consumer. In its report to the legislature in 1973, the commission declared:

> "In actual practice the statute had altogether different results. By attempting to keep liquor prices artificially high, the statute appeared to protect the interests of existing retail licensees and keep vigorous competition to a minimum. It also gave the distilling and wholesaling levels of the liquor industry near-total authority to administer prices, backed up by the power of the state. It created, in effect, virtually all the characteristics of a monopoly operated for private benefit."[6]

The commission also found that the 1969 and 1971 moratoriums did not eliminate the statutory-induced practice by wholesalers and brand owners of circulating lists of suggested retail prices, and that "[t]his form of 'voluntary fair trade' * * * can be used to perpetuate the price maintenance tradition and provide a shelter from competition."[7]

Prior to 1969, the statutory scheme did not prevent a distiller or manufacturer from choosing to market his product within the state exclusively through a single wholesaler. This practice of exclusive wholesale dealerships had become en-

[6] Liquor Study Commission, Final Report 1973, p. 5.
[7] Id. at p. 7.

trenched during the years prior to 1969, with the result that the retailer, be he a private businessman or a municipality,[8] in order to sell a particular brand of liquor, was compelled to deal with a particular wholesaler and to pay that wholesaler's price. As the Liquor Study Commission observed, the existence of a relatively few wholesalers, with an apparent market concentration in four of the wholesalers, and the exclusive-brand distribution system provoked the most frequent allegation of monopolistic practices and price fixing against the liquor industry.[9] The trial court found upon ample evidence, as the Liquor Study Commission report indicated, that while there is vigorous competition between distillers and wholesalers in sales to retailers and consumers of particular brands of liquor —that is, *interbrand* competition—, there is no *intrabrand* competition, since virtually all brands of liquor are available from only one wholesaler. In 1969, the legislature attempted to promote intrabrand competition by enacting a statute which prohibited contractual agreements establishing exclusive wholesale distributorships.[10] That statute was ineffective since both distillers and wholesalers found it to their advantage to continue the practice of sole distributorships by the distillers, declaring that they had no agreement to do so but simply chose in their discretion to limit sales to a wholesaler of demonstrated loyalty, efficiency, and selling ability.

[8] Municipally-owned liquor stores are authorized in Minnesota. § 340.353.

[9] Liquor Study Commission, Final Report 1973, p. 14.

[10] Minn. St. 1971, § 340.984 (L. 1969, c. 1119, § 5, repealed by L. 1973, c. 664, § 10), provided: "It shall be unlawful for any wholesaler to enter into an agreement with a manufacturer by the terms of which the manufacturer is prohibited from supplying intoxicating liquor to any other wholesaler within the state. Any such agreement, whether entered into before or after June 7, 1969, is hereby declared to be contrary to public policy and void. In addition, the entering into of any agreement prohibited by Laws 1969, Chapter 1119 after the effective date of enactment shall constitute grounds for revocation of a wholesaler's license."



It was with this background that the 1973 Legislature enacted c. 664. That enactment was accompanied by the repeal of both the fair trade law and § 340.984 prohibiting sole distributorships.[11] The implicit design of c. 664 is to abolish sole distributorships and thereby promote intrabrand price competition by requiring all licensed distillers importing distilled spirits into Minnesota to offer to sell their manufactured product or brands of liquor to all licensed Minnesota wholesalers on an equal basis and at an affirmation price, that is, to sell at the lowest price at which a distiller sells its liquor at wholesale in the United States. Its ultimate objective is to ensure that wholesalers can buy at the lowest national price and, by making all distillers' brands available to them, to encourage them by competition to lower prices to the retailers, who hopefully, now able to compete with one another for the sale of all brands, will lower prices to Minnesota consumers. Its effect on this state's licensed components of the liquor industry is to prohibit discrimination by distillers in favor of one licensed wholesaler against another; to transfer control over the distribution and sale of the various brands of liquor from the distillers to the wholesalers; and to promote a wider distribution of liquor brands throughout the state by affording retailers the opportunity to purchase a variety of brands from competing wholesalers. This legislation obviously is not designed to promote temperance, since, if lower consumer prices result, the opposite may occur even though, speculatively, the necessity of distillers or wholesalers to aggressively merchandise various brands by intensive advertising may be di-

[11] Also repealed were residency requirements for wholesalers, Minn. St. 1971, § 340.11, subd. 2, an adoption of the recommendation of the Liquor Study Commission that such was desirable to ensure competition at the wholesale level by removing a barrier to entry into the wholesale level of the market.

minished and thereby stimulation of consumer buying habits lessened.

Plaintiffs broadly challenge c. 664 on every conceivable constitutional ground. In considering this attack, we must bear in mind the following fundamental principles:

1. The legislature possesses all legislative power not withheld or forbidden by the State or Federal Constitutions. George Benz Sons, Inc. v. Ericson, 227 Minn. 1, 34 N. W. 2d 725 (1948). Courts do not pass upon the soundness of social or economic theories in the legislative mind when statutes are enacted in exercise of the police power, nor can courts substitute their judgment for that of the legislature as to the wisdom, expediency, or effectiveness of this type of regulation. Fairview Hospital Assn. v. Public Bldg. Service Union, 241 Minn. 523, 64 N. W. 2d 16 (1954); Lee v. Delmont, 228 Minn. 101, 36 N. W. 2d 530 (1949). To warrant the judiciary's declaring an act invalid, it must be able to point out some constitutional limitation which the act clearly transcends. State v. Corbett, 57 Minn. 345, 59 N. W. 317 (1894).

2. This act, like every legislative enactment, comes to the courts with a presumption in favor of its constitutionality. Klicker v. State, 293 Minn. 149, 197 N. W. 2d 434 (1972); Head v. Special School Dist. No. 1, 288 Minn. 496, 182 N. W. 2d 887 (1970), certiorari denied sub nom. 404 U. S. 886, 92 S. Ct. 196, 30 L. ed. 2d 168 (1971); 17B Dunnell, Dig. (3 ed.) § 8929. The burden of proof is on the challenging parties to show beyond a reasonable doubt that the act violates some particular constitutional provision. Minneapolis Federation of Teachers v. Obermeyer, 275 Minn. 347, 147 N. W. 2d 358 (1966).

3. Since all enforcement of the act has been restrained both during trial and pending this appeal, we deal only with



whether the challenged provisions are unconstitutional on their face. When an act is challenged on its face, the reviewing court is permitted to consider neither hypothetical applications of the act which might be unconstitutional nor possible constructions of the act which might render it unconstitutional. If a legislative act is reasonably susceptible of two different constructions, one of which will render it constitutional and the other unconstitutional, the former must be adopted. Hassler v. Engberg, 233 Minn. 487, 48 N. W. 2d 343 (1951); State v. Rawland, 294 Minn. 17, 199 N. W. 2d 774 (1972).

4. Finally, and of vital significance, is the Twenty-First Amendment to the Federal Constitution, § 2 of which provides:

> "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

It has been held repeatedly that this amendment has bestowed upon the states broad regulatory powers over liquor importation, recognized as something more than the normal state authority over health, welfare, and morals. State Board of Equalization v. Young's Market Co. 299 U. S. 59, 57 S. Ct. 77, 81 L. ed. 63 (1936); Joseph E. Seagram & Sons, Inc. v. Hostetter, 16 N. Y. 2d 47, 262 N. Y. S. 2d 75, 209 N. E. 2d 701 (1965), affirmed, 384 U. S. 35, 86 S. Ct. 1254, 16 L. ed. 2d 336 (1966); Mahoney v. Joseph Triner Corp. 304 U. S. 401, 58 S. Ct. 988, 82 L. ed. 1424 (1938); United States v. Frankfort Distilleries, Inc. 324 U. S. 293, 65 S. Ct. 661, 89 L. ed. 951 (1945); California v. LaRue, 409 U. S. 109, 93 S. Ct. 390, 34 L. ed. 2d 342 (1972). Thus we have held that no one has the absolute right to engage in selling intoxicating liquors. It is

a privilege granted by the licensing authority and subject to the state's police power. George Benz Sons, Inc. v. Ericson, *supra;* Giozza v. Tiernan, 148 U. S. 657, 13 S. Ct. 721, 37 L. ed. 599 (1893). When once licensed, no one can acquire a vested right to continue in a business which is subject to regulation under the police power. Paron v. City of Shakopee, 226 Minn. 222, 32 N. W. 2d 603 (1948); 45 Am. Jur. 2d, Intoxicating Liquors, §§ 115, 116. The Twenty-First Amendment does not, however, empower the states to invade equal-protection and due-process constitutional rights guaranteed by the Fourteenth Amendment. Wisconsin v. Constantineau, 400 U. S. 433, 91 S. Ct. 507, 27 L. ed. 2d 515 (1971); California v. LaRue, *supra;* George Benz Sons, Inc. v. Ericson, *supra;* Sail'er Inn. Inc. v. Kirby, 95 Cal. Rptr. 329, 485 P. 2d 529 (1971). We are mindful that the Twenty-First Amendment does not limit the scope of equal-protection and due-process guarantees of the Minnesota Constitution.[12] However, we apply Fourteenth Amendment standards since we are aware of no compelling reason peculiar to this state which would justify more stringent state standards.

In the light of these fundamentals, we believe that a number of plaintiffs' arguments may be disposed of without lengthy discussion. Plaintiffs argue that there is no guarantee that the benefits of intrabrand competition at the wholesale level will be passed on to consumers; that desirable brands may disappear from Minnesota; that some wholesalers may be unable to compete effectively; that wholesalers' salesmen will lose their employment; and that some brands of liquor will receive no promotion. All these arguments involve the sort of informed prediction and considered decision making that is

[12] Minn. Const. art. 1, §§ 2, 7; art. 12, § 1.



peculiarly for the legislature rather than the courts. The argument of plaintiff Johnson that two of its distiller suppliers, Federal and Mr. Boston, are required by the act to sell liquor bottled under brands owned by Johnson to all wholesalers is speculative and hypothetical. There is no indication that the liquor commissioner is about to construe the statute in such a way as to invade Johnson's right of ownership in its registered private-brand labels, and the statute on its face clearly does not require such a construction. Plaintiffs also claim constitutionally-protected vested property rights in wholesalers based upon their having acquired wholesalers' licenses and having spent money on advertising, salesmen, and the promotion of particular brands of liquor. We hold that no such vested rights in the continuance of the existing distribution system exist and, in addition, observe that it is neither the purpose or likely effect of this statute to drive any wholesaler out of business.[13]

Plaintiffs also allege an equal-protection discrimination between out-of-state importers and Phillips, which imports bulk liquor into Minnesota, performs rectifying, blending, and bottling operations in Minnesota, and sells the bottled liquor under its own brand labels to wholesalers in other states and to Minnesota retailers as the sole wholesale distributor. They insist that the statute cannot be construed to include Phillips in view of the fact that Phillips does not hold a license under § 340.113 and, under the commission's regulations existing at the time of trial, an "importer" was defined as "any out-of-state dis-

[13] Plaintiffs challenge the trial court's findings of fact, primarily for the reason that the findings fail to recognize the investment of the plaintiffs in building up their business under the existing system of distribution. We have reviewed the findings and the record and find them to be neither incomplete nor clearly erroneous. Rule 52.01, Rules of Civil Procedure; In re Estate of Balafas, 293 Minn. 94, 198 N. W. 2d 260 (1972).

tillers."[14] In so arguing, plaintiffs are urging a construction of the statute which would call its constitutionality into question. They insist that Phillips be excluded from the statutory classification "licensed importer" and at the same time insist that such a construction would constitute a violation of equal protection. We find this argument without merit under the fundamental principle of presumed constitutionality previously discussed. See, also, In re Taxes on Property of Cold Spring Granite Co. 271 Minn. 460, 136 N. W. 2d 782 (1965). The trial court's construction of the statute to include Phillips as a "licensed importer" is reasonable. While Phillips does not hold a license under § 340.113, it does hold a license under § 340.11, which explicitly includes the right to import.[15] The trial court found as fact upon undisputed evidence that Phillips does bring liquor into the state and, on that basis and in answer to Phillips' request for declaratory judgment, found that Phillips is included within the statutory classificaton. Moreover, there is no indication that the commissioner is inclined to adopt regulations which would render unconstitutional the enforcement of the act. The regulations relied upon were in force before the enactment of c. 664, which when enforced will require the issuance of new regulations.[16] Mindful of the rule that a statute must be construed to save its constitutionality, we hold the trial court's construction to be correct and consistent with the intent of the legislature and the plain language

[14] State of Minnesota, Liquor Control Commissioner, Regs. Relating to the Administration of the Office of Liquor Commissioner, 1970 ed., Definitions, p. 12. See, also, Regs. Liq. 68 and Liq. 70, p. 47.

[15] See footnote 3, *supra*.

[16] It should be noted that the preface to definitions in the 1974 edition of the liquor control regulation reads as follows: "The adoption, repeal or amendment of any regulation herein shall not be deemed applicable to the enforcement or construction of Minn. Laws 1973 Chapter 664 Section 2 (Minn. Stat. Section 340.114)." Dept. of Administration, Rules and Regs. of the Dept. of Liquor Control, p. 9.



of the act. Therefore plaintiffs' equal-protection challenge cannot be sustained.

Plaintiffs also urge that the act's exclusion from coverage of wines and malt beverages constitutes an invidious discrimination, rendering the act invalid under equal-protection guarantees. While we recognize that wine, beer, and liquor are similarly distributed and sold, and that liquor may in a broad sense compete with the other two beverages for the consumer dollar, we agree, as the trial court found, that the differences inherent in the products themselves justify the legislative decision to include only distilled spirits within this act. More important is the principle that a law is not to be overthrown because there are other instances to which it might have been applied, and the fact that a statute discriminates does not make the classification invidious if it is founded upon a rational distinction. State v. Pehrson, 205 Minn. 573, 287 N. W. 313 (1939); George Benz Sons, Inc. v. Ericson, *supra*. The Fourteenth Amendment does not compel a legislature to prohibit all the evils or none, and a legislature may hit at an abuse which it has found even though it fails to strike at another. United States v. Carolene Products Co. 304 U. S. 144, 58 S. Ct. 778, 82 L. ed. 1234 (1938). Furthermore, legislative economic reform may take one step at a time, addressing itself to that phase of the problem which seems most acute to the legislative mind. Joseph Seagram & Sons, Inc. v. Hostetter, 384 U. S. 35, 86 S. Ct. 1254, 16 L. ed. 2d 336 (1966); Williamson v. Lee Optical Co. 348 U. S. 483, 75 S. Ct. 461, 99 L. ed. 563 (1955). As the trial court found, the legislature could reasonably determine that the public interest does not require open wholesaling of wines and beers at this time due to differences in requirements for the sale of wines and beers, the absence of significant competition between wines and beers on the one

hand and distilled spirits on the other, and the greater number of wholesalers selling wines and beers. The Benz case, heavily relied upon by plaintiffs, is distinguishable, for there the court recognized the broad prerogatives of the legislature in making classifications but failed to discern the purpose of the legislature in separating wine and distilled spirits at the wholesale level.

Finally we come to what we regard as the most serious challenge asserted. Section 2 of the act makes it unlawful for every distiller who chooses to offer his distilled spirits to one Minnesota wholesaler to refuse to sell to all other licensed wholesalers on an equal basis and, it is asserted by necessary implication, creates a presumption that every such refusal except for "arrears on payments for past purchases" is a violation justifying criminal sanctions.

Plaintiffs contend that this provision is an arbitrary and unreasonable exercise of state police power in violation of due-process guarantees. While conceding that the state may legislate to promote the economic welfare of its citizens, plaintiffs, arguing broadly, attack this provision as one having no counterpart in the economic regulation of any other legitimate business and as an oppressive, unwise, and impractical means of reducing consumer prices, a result, they insist, which has neither been proven nor found by the trial court. More pointedly and with more merit, they argue that this interference with their freedom to deal with respect to their property is overbroad because they claim there are "many legitimate nonmonopolistic legally justifiable business reasons" justifying a distiller's refusal to offer to sell to a particular wholesaler which have no bearing on the purpose and objective of the act to promote competition and price reduction to consumers. Enumerated examples of such business reasons are refusing



to deal with a wholesaler of unsavory character, with one who employs so-called "footballing" tactics to injure competitors, or with one who has a poor record of promoting the sale of a distiller's brand, or with a wholesaler who is owned by a distiller so that the effect of dealing with him is comparable to "putting the fox in the henhouse." In view of these claimed potential, justifiable reasons to refuse to deal, it is argued that "the act in effect creates compulsory, nonterminable franchises for every licensed wholesaler." Additionally, it is argued that the claimed conclusive presumptions inherent in § 2 making every refusal to deal except for credit reasons unlawful is unreasonble and arbitrary because "[a] law which closes a litigant's mouth in court is as bad as a law which deprives him of access to it." Twin City Candy & Tobacco Co. Inc. v. A. Weisman Co. 276 Minn. 225, 231, 149 N. W. 2d 698, 702 (1967). This two-pronged attack thus challenges not only the legislature's power to abolish sole distributorships but the appropriateness of the means chosen to do so.

As a constitutional principle, it is well established that the freedom to contract with respect to one's property and in the conduct of a lawful business to select the party with whom one chooses to do so is a part of the liberty protected by the due-process clauses of the State and Federal Constitutions. But, as declared in Nebbia v. New York, 291 U. S. 502, 523, 54 S. Ct. 505, 510, 78 L. ed. 940, 948 (1934):

> "* * * [N]either property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest."

It is elementary that the state by virtue of its sovereignty may regulate private conduct for public benefit. In the field of economic regulation, without burdening this opinion by a historical recital of the changing attitude of the nation's courts, it is settled that the legislature is free to adopt whatever economic policy it deems will promote the public good.[17] Where an economic regulation is enacted, the guarantee of due process demands only (1) that the act serve to promote a public purpose; (2) that it not be an unreasonable, arbitrary, or capricious interference; and (3) that the means chosen bear a rational relation to the public purpose sought to be served. Bearing in mind the legislative history of liquor regulation in this state, there exists no basis to invalidate the exercise of police power for the economic purposes of preventing monopolies and promoting competition to lower prices to consumers. Twin City Candy & Tobacco Co. Inc. v. A. Weisman Co. *supra*. The critical question presented is not whether the legislative goal is in the public interest, but rather whether the act is an unreasonable and arbitrary interference with the liquor industry and whether the particular means chosen to

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[17] In Ferguson v. Skrupa, 372 U. S. 726, 729, 83 S. Ct. 1028, 1030, 10 L. ed. 2d 93, 96 (1963), the court said: "* * * Under the system of government created by our Constitution, it is up to legislatures, not courts to decide on the wisdom and utility of legislation. There was a time when the Due Process Clause was used * * * to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy. * * *

"The doctrine * * * —that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws."

See, also, McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 Supreme Court Review 34; Hetherington, *State Economic Regulation and Substantive Due Process of Law*, 53 Nw. U. L. Rev. 13, 53 Nw. U. L. Rev. 226.



achieve the legislative goal infringes upon the distillers' constitutional freedom to refuse to deal with all licensed wholesalers on an equal basis. As previously noted, arguments that this provision is unreasonable, arbitrary, or capricious because it singles out the liquor industry and is oppressive, unwise, and impractical are arguments properly addressed to the legislature.

Nor can we agree that the act in effect creates a compulsory, nonterminable franchise in wholesalers. It neither requires nor compels every distiller, even though licensed, to offer his product to Minnesota wholesalers. Nor does it in any way infringe upon a Minnesota wholesaler's existing right to deal with or buy from a distiller or to deal with or sell to retailers in open, unfettered competition with each other. Its thrust is the elimination of the right to obtain exclusive dealerships by prohibiting all discrimination of distillers among wholesalers and compelling those who offer to sell their brands of liquor to one Minnesota wholesaler to do so to all on an equal basis. Under the existing system, the control of distribution of manufactured liquor is necessarily vested in the distiller or manufacturer. The legislature could readily determine that a distiller's refusal to deal with other than one wholesaler, or a wholesaler's inability to buy from all who bring liquor into the state, effectively controls the availability of various brands of liquor to the retailer and the ultimate consumer; that supply and demand for a particular brand of liquor affects its price; and that such control over distribution necessarily affects the ultimate price to Minnesota consumers. It is hardly debatable that the legislature could thus reasonably conclude, as the Liquor Study Commission did, that exclusive distributorships portend monopolistic practices, inevitably limit intrabrand competition, and ultimately affect the price to con-

sumers. Equally sound, we believe, is our conclusion that prohibiting discrimination by restricting refusals to deal on an equal basis with all wholesalers is not an arbitrary and unreasonable interference with the liquor industry and bears a rational, if not a substantial, relationship to the economic welfare of the public.

However, the most difficult question remains, namely whether every prohibited refusal to deal amounts to a constitutionally impermissible conclusive presumption. Assuming that a conclusive presumption is intended, we confront plaintiffs' contention that this is a denial of procedural due process no different from the irrebuttable presumptions denounced in Twin City Candy & Tobacco Co. Inc. v. A. Weisman Co. *supra*, and recently by the United States Supreme Court in Vlandis v. Kline, 412 U. S. 441, 93 S. Ct. 2230, 37 L. ed. 2d 63 (1973), and Cleveland Board of Education v. LaFleur, —— U. S. ——, 94 S. Ct. 791, —— L. ed. 2d —— (1974). In Weisman, we held unconstitutional a legislative attempt to prohibit sales of cigarettes below cost on the ground that a legislative declaration exclusively presuming all sales below cost to be with intent to injure a competitor or destroy competition was unjustified in fact and denied procedural due process. In Vlandis, the United States Supreme Court invalidated a Connecticut statute which employed a conclusive presumption of nonresidency for the purpose of determining an applicant's qualification for lower tuition charges at the state university, holding (412 U. S. 452, 93 S. Ct. 2236, 37 L. ed. 2d 71):

> "* * * [I]t is forbidden by the Due Process Clause to deny an individual the resident rates on the basis of a permanent and irrebuttable presumption of nonresidence, when that presumption is not necessarily or universally true in fact, and when the State has reasonable alternative means of making the crucial determination."



In LaFleur, the court, relying on Vlandis, reaffirmed its view that irrebuttable presumptions have long been disfavored by the due-process clause. There, the court invalidated regulations promulgated by school boards which compelled teachers to take unpaid maternity leaves by employment of a conclusive presumption that every pregnant teacher in the fifth or sixth month of pregnancy is physically incapable of continuing.[18] In each of these cases, including the Weisman case, the conclusive presumption mandated was found to be not necessarily true in fact.[19]

We are not persuaded that the legislature's employment of a conclusive presumption classifying every refusal to deal as an intentional discrimination violated due process, for we are not prepared to hold that such a presumption is not necessarily true in fact or that it unreasonably or arbitrarily infringes on a distiller's freedom to contract. Unlike the Weisman case, which prohibited all below-cost sales including sales to consumers, c. 664 regulates only sales by distillers to wholesalers, whose sole reason to purchase is resale, not consumption. Furthermore, unlike Weisman, it is significant that the presumption employed is not designed to establish every refusal as intentionally destructive of competition. Although the ultimate goal of the act, read in its entirety, is to promote competition, the primary intent of the challenged provisions is to eliminate exclusive dealerships by prohibiting predatory discrimination by distillers. The essence of an alleged violation is therefore

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[18] See, also, Bell v. Burson, 402 U. S. 535, 91 S. Ct. 1586, 29 L. ed. 2d 90 (1971); Stanley v. Illinois, 405 U. S. 645, 92 S. Ct. 1208, 21 L. Ed. 2d 551 (1972).

[19] The proper reach or scope of the constitutional standard denouncing the use of irrebuttable presumption is far from settled since we find no cases invalidating its use in the area of economic regulations except for Twin City Candy & Tobacco Co. Inc. v. A. Weisman Co. 276 Minn. 225, 149 N. W. 2d 698 (1967).

intentional discrimination, not intentional injury to other competing distillers. The latter mischief is effectively prevented at the distillers' level by the requirement of price affirmation, which is not, and cannot be, challenged because an identical requirement was held constitutional in Joseph E. Seagram & Sons, Inc. v. Hostetter, *supra*.

In effect, what the legislature has done is to classify all non-credit refusals to sell as discriminatory, tending to adversely affect open intrabrand competition. Plaintiffs hypothetically claim that a particular refusal may be justifiably discriminatory for other reasons which can have no bearing on such competition. In other words, it is argued that a distiller charged with a violation has a constitutional right to rebut the presumption of unlawful discrimination by presenting evidence that such refusal was justified and did not lessen or destroy intrabrand competition.

This, of course, raises a question of the constitutionality of the act as applied to an assumed state of facts, a question which need be answered only when presented in a proper case. The answer to the challenge of overbreadth in our opinion is that the legislature, in enacting this provision in pursuit of an economic goal, reasonably could determine that in order to abolish exclusive distributorships and to promote intrabrand competition all refusals to deal for other than credit reasons must be prohibited since such discrimination in fact necessarily frustrates achieving that ultimate goal and its consequent anticipated liquor price reductions. Furthermore, the legislature could have determined that allowing other business reasons to be asserted would require establishing rigid statutory standards more appropriately left to enforcement regulation delegated to the commissioner. In answer to the question presented on this appeal, it is sufficient to observe that the legislature could conclude that specifying credit reasons alone



as justifying a refusal to deal will not significantly or unfairly impair or deprive distillers of their right, indeed their opportunity, to market their products in this state. To assert that a wholesaler's "unsavory" reputation or his employment of the unfair trade practice of "footballing" to destroy competition of equivalent brands justifies refusal not only ignores the liquor commissioner's regulatory power to revoke wholesalers' licenses for just cause, including trade practices condemned by Minn. St. 325.14, but also threatens to reinvest the distiller with the control he can now exercise over a wholesaler. To assert that a wholesaler's inadequate promotion of a distiller's brand justifies refusal is to ignore the reality of both the wholesaler's and retailer's unrestrained freedom to refuse to buy. A distiller's compulsion to offer to sell to a wholesaler owned by a competing distiller is more difficult to evaluate. However, the record shows that both leading wholesalers, Ed Phillips & Sons and Johnson, appear to have suffered no prejudice in marketing their own brands along with competing brands supplied them by their respective distillers.

This analysis, we are satisfied, supports our conclusion that the presumption here employed may be necessarily true in fact. It is a determination peculiarly within the knowledge and experience of legislators. United States v. Carolene Products Co. 304 U. S. 144, 58 S. Ct. 778, 82 L. ed. 1234 (1938). To paraphrase the Hostetter court, we cannot say that the legislature acted unconstitutionally when it determined to abolish exclusive dealerships, and that only by imposing a presumptive limitation on prohibited refusals to deal, coupled with the " 'no higher than the lowest price' " requirement, could the grip of liquor distillers and wholesalers on Minnesota liquor prices be loosened.[20]

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[20] Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U. S. 35, 86 S. Ct. 1254, 16 L. ed. 2d 336 (1966).

We emphasize that our decision upholds the constitutionality of c. 664 only on its face. Plaintiffs' fears that constitutional infirmities will appear upon enforcement must of course await judicial review when and if they arise.

Affirmed.

MR. JUSTICE OTIS concurring in part, dissenting in part, opinion to follow.

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## APPENDIX EXHIBIT B

No. 209 1/2 Ramsey County

Rogosheske, J.
Took no part,
Sheran, C. J.

Endorsed
Filed May 2, 1975
John McCarthy, Clerk
Minnesota Supreme Court

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Federal Distillers, Inc., et al.,
*Respondents-Appellants,*
44831, 44837, 44844 vs.
State of Minnesota and Joseph Novak,
Liquor Control Commissioner of Minnesota,
*Respondents,*
Ed Phillips & Sons Co., intervenor,
*Appellant-Respondent,*
Griggs, Cooper & Co., Inc., intervenor,
*Respondent-Appellant,*
Raymond Distributing Co., Inc., intervenor,
*Respondent.*



and
Old Peoria Company, Inc., Heaven Hill Distilleries, Inc., and National Distillers & Chemical Corporation,
*Appellants,*
44832, 44833, 44834 vs.
Joseph Novak, Liquor Control Commissioner of Minnesota,
*Respondent.*

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## SYLLABUS

Upon plaintiffs' appeal in actions for declaratory judgment and injunctive relief challenging the trial court's decision interpreting and upholding the facial constitutionality of provisions of L. 1973, c. 664, § 2 (now coded as Minn. St. 340.114), an amendment to the Intoxicating Liquor Act designed to prohibit exclusive wholesale dealerships by regulating the distribution and sale of liquor by licensed distillers and wholesalers to promote economic goals *held*

a. That the trial court's interpretation of L. 1973 c. 664 to include plaintiff Ed Phillips & Sons Company a licensed wholesaler and manufacturer within the classification of a "licensed importer" is reasonable; is consistent with its factual findings the language of the act and the intent of the legislature; and is required under the rule of presumed constitutionality of a legislative act against a claimed denial of equal protection by other licensed wholesalers.

b. The act does not on its face transgress constitutionally protected private or property rights of presently licensed Minnesota wholesalers for the Twenty-First Amendment to the Federal Constitution empowers the states through the exercise of police power to entirely prohibit or broadly regulate the importation distribution and sale of liquor and a whole-

saler's license is not a vested right but a privilege subject to such regulations.

c. The claim by plaintiff Johnson Brothers Wholesale Liquor Company that the act requires the sale to all other wholesalers of liquor bottled under registered private brands owned by it is hypothetical for there is no threatened construction or enforcement which would invade such ownership and the act on its face does not require such construction.

d. The act's failure to include in its regulation wines and malt beverages similarly distributed and sold in this state does not constitute an invidious discrimination in violation of equal-protection guarantees.

e. The provisions of the act which require every licensed distiller to sell his manufactured product at no higher than the lowest price offered elsewhere in the United States and make it unlawful for every distiller who chooses to offer his product to one licensed wholesaler to refuse to deal with other Minnesota wholesalers on an equal basis are a valid exercise of the state police power since it constitutes a reasonable legislative determination to abolish the existing system of exclusive wholesale dealerships which portend monopolistic practices, inevitably limit competition, and ultimately affect consumer prices; and prohibiting such refusals to deal by distillers bears a rational relation to the promotion of the economic welfare of the public.

f. The provisions of the act classifying every distiller's refusal to deal above described except for "arrears on payments for past purchases" as discriminatory is on its face neither overbroad nor amounts to the employment of a constitutionally impermissible presumption violative of due process for as presented here it constitutes no more than a finding peculiarly within the knowledge and experience of the



legislature that every prohibited refusal to deal necessarily frustrates achieving the economic goals sought and such a finding will not under appropriate enforcement regulations be applied to offend due process or unreasonably interfere with a distiller's legitimate marketing rights and opportunities in this state.

Affirmed.

Considered and decided by the court en banc.

OPINION

ROGOSHESKE, Justice.

These appeals challenge the constitutionality of L. 1973, c. 664, § 2, now coded as Minn. St. 340.114, an amendment to Minnesota's Intoxicating Liquor Act requiring all licensed importers (distillers) of liquor to offer their products for sale to all Minnesota liquor wholesalers on an equal basis.[1] The

[1] Minn. St. 340.114 (L. 1973, c. 664, § 2) provides: "Subdivision 1. All licensed importers shall offer for sale on an equal basis to all licensed wholesalers and manufacturers all intoxicating liquor brought into the state of Minnesota.

"Subd. 2. Without limiting subdivision 1, the following shall be deemed failures to offer intoxicating liquor for sale on an equal basis and are unlawful:

(a) A refusal to sell any intoxicating liquor to a wholesaler or manufacturer, which is offered for sale to any other wholesaler or manufacturer, except when a wholesaler or manufacturer is in arrears on payments for past purchases from the importer who refuses to sell.

(b) A sale of any intoxicating liquor to any wholesaler or manufacturer at a price different from that offered to any other wholesaler or manufacturer, exclusive of shipping costs, except that quantity discounts based upon actual cost savings may be uniformly offered to all wholesalers and manufacturers.

(c) A sale of any intoxicating liquor to any wholesaler or manufacturer on terms of purchase different from those offered any other wholesaler or manufacturer, except that when the importer reasonably believes that a wholesaler or manuacturer will be unable to comply with the existing terms of credit, then other terms may be employed, including denial of credit.

(d) Any discrimination among wholesalers and manufacturers in satisfying their respective demands for any intoxicating liquor.

(e) A sale conditioned upon an agreement which restricts the wholesaler or manufacturer with respect to customers, area for dis-

court below found the statute constitutional in all respects. As we find c. 664 to be a valid exercise of the state's police power to promote the public's economic welfare, and that plaintiffs, licensed distillers and wholesalers of liquor, have failed to establish that any provisions of the act on their face transgress constitutionally protected property rights, we affirm.

These cases seeking declaratory judgment and injunctive relief were commenced in June and July of 1973 by the various plaintiffs, all of whom are involved in the distribution of liquor in Minnesota. By order of the Ramsey County District Court the cases were consolidated for trial, and enforcement

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tribution, or resale price, or which otherwise restrains the wholesaler or manufacturer from competing in trade and commerce.

(f) For purposes of this subdivision and subdivision 1 only, the term 'intoxicating liquor' shall not include 'pop wines' as the same are defined by regulation of the commissioner.

"Subd. 3. No licensed importer or manufacturer shall offer or sell to any licensed wholesaler any intoxicating liquor at a bottle , or case price which is higher than the lowest price at which such item of liquor is contemporaneously being sold by such importer or manufacturer to any wholesaler anywhere in any other state of the United States or in the District of Columbia or to any state or state agency which owns and operates retail liquor stores.

"In determining the lowest price for which any item of liquor is being sold in any other state or in the District of Columbia, or to any state or state agency which owns and operates retail liquor stores, appropriate reductions shall be made to reflect all discounts, rebates, free goods, allowances and other inducements of any kind whatsoever offered or given to any such wholesaler, state, or state agency purchasing such item in such other state or in the District of Columbia; provided that nothing contained herein shall prevent differentials in price which make only due allowance for differences in state taxes and fees, and in the actual cost of delivery. As used in this subdivision, the term 'state taxes or fees' shall mean the excise taxes imposed or the fees required by any state or the District of Columbia based upon a gallon of liquor.

"Subd. 4. Nothing in this section shall apply to any wines or malt beverages regardless of alcoholic content."

The portions of the statute particularly challenged here are subds. 1, 2(a), and 4.

Minn. St. 340.19 provides criminal penalties for voliation of the Intoxicating Liquor Act.



of the statute was temporarily restrained. The matter was tried to the court without a jury in September 1973. The trial court held that the statute is neither an improper exercise of police power, overbroad in operation, nor in violation of the constitutional guarantees of due process and equal protection. Plaintiffs moved the court for amended findings of fact and conclusions of law or for a new trial. The trial judge denied the motions, and plaintiffs appeal from those denials. Upon plaintiffs' motion, this court continued the restraint on enforcement of the statute pending decision on appeal.

Plaintiffs fall generally into two categories: (1) "Distillers," or corporations licensed as importers under § 340.113[2] which manufacture, rectify, blend, bottle, and label liquor which is sold to wholesale distributors in Minnesota; and (2) "wholesalers," or Minnesota corporations licensed under § 340.11, subd. 2,[3] to sell liquor at wholesale in Minnesota. The distillers include:

1. Federal Distillers, Inc., a Massachusetts corporation, which sells its brands of distilled spirits only to Johnson

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[2] There are at present approximately 150 holders of licenses under § 340.113 which provides in part: "Subdivision 1. No intoxicating liquor or ethyl alcohol shall be shipped into this state by any distiller, rectifier, winer, or wholesale distributor, or any other person, to any licensed Minnesota manufacturer or wholesale dealer unless and until such distiller, rectifier, winer, wholesale distributor, or such other person has secured a license from the liquor control commissioner permitting him so to do."

[3] There are at present 11 holders of wholesaler's licenses under § 340.11, which provides in pertinent part: "Subdivision 1. It shall be unlawful for any person, directly or indirectly, upon any pretense or by any device, to manufacture, import, sell, exchange, barter, dispose of, or keep for sale any intoxicating liquor without first having obtained a license therefor. * * *

"Subd. 2. Manufacturers' and wholesalers' licenses shall be issued by the liquor control commissioner.

"A manufacturer's or wholesaler's license shall include the right to import. The business of manufacturer and wholesaler may be combined and carried on under one license issued therefor."

Brothers Wholesale Liquor Company (Johnson). Some of its manufactured products are bottled and labeled under brands owned by Federal and some are labeled under brands owned by Johnson.

2. Mr. Boston Distiller Corporation, a Massachusetts corporation, which bottles distilled spirits under brands owned by Johnson and under brands owned by Mr. Boston. Mr. Boston sells such brands only to Johnson in Minnesota.

3. National Distillers & Chemical Corporation, a Virginia corporation, which sells its branded liquor and wines only to Ed Phillips & Sons in Minnesota.

4. Heaven Hill Distillers, Inc., a Kentucky corporation, which sells its liquors to Old Peoria Company, Inc., under brands owned by Heaven Hill.

The second group of plaintiffs, the wholesalers which sell to licensed retailers, includes:

1. Johnson Brothers Wholesale Liquor Company, which deals in liquor and wine and owns registered private-brand labels under which liquor is distilled for it by Federal and Mr. Boston.

2. Old Peoria Company, Inc., which sells both liquor and wine.

3. Griggs, Cooper and Company, Inc., which distributes and sells both wine and liquor.

4. Ed Phillips & Sons Company (Phillips), a Minnesota corporation licensed under § 340.113 and carrying on importation, manufacturing, and wholesaling operations under that license. Phillips imports bulk whiskey, which it then rectifies, blends, bottles, and labels with its own registered brand labels. Phillips sells these branded products to retailers in Minnesota and to wholesalers in other states. Phillips also purchases liquor from National and other distillers outside of Minnesota and sells that liquor to Minnesota retailers as the sole wholesale outlet.



Named defendants include the State of Minnesota and Joseph Novak, the liquor control commissioner. Raymond Distributing Company, Inc., which intervened as a defendant, is a Minnesota wholesaler, licensed in May 1973. Raymond has unsuccessfully attempted to purchase certain established brands of intoxicating liquors from some out-of-state distillers and, although it could apparently purchase some unknown or lesser-established brands of intoxicating liquor, it has not commenced business.

Chapter 664, essentially designed to abolish exclusive wholesale distribution of liquor and thereby to promote price competition by seeking to eliminate actual or potential monopolistic practices and price fixing by distillers and wholesalers, adds another page to the long history of legislative regulation of liquor in Minnesota. The most recent thorough revision of the liquor laws occurred in 1967 with the passage of the Intoxicating Liquor Act.[4] That act, together with the earlier regulatory and licensing statutes, has in large measure dictated the pattern of the present system of liquor distribution to Minnesota consumers. In general, that system is three-tiered, consisting of the distiller (also referred to as a manufacturer in our statutes), the wholesaler, and the retailer, each of whom carries on his activities under licenses and various prohibitions of the statutory scheme established by Minn. St. c. 340 and regulations promulgated by the liquor control commissioner. Beginning in 1951, the major effort by the legislature to impose economic regulations to affect the price of liquor was the so-called "fair trade" law.[5] Its design and purpose

[4] L. 1967, c. 19 (Minn. St. 340.07 to 340.353, 340.355 to 340.407, 340.493, and 340.51). See Historical Note preceding c. 340 at 22 M. S. A. p. 9.
[5] Minn. St. 1971, §§ 340.97 to 340.978.

was declared to be to promote temperance and eliminate "price wars," which the legislature determined unduly stimulated the sale and consumption of alcoholic beverages. Under this law, wholesalers or brand owners were required to file minimum consumer retail prices for each brand sold to retailers, and the latter were prohibited from selling to consumers for less than the filed price. In 1969, and again in 1971, enforcement of this law was suspended, presumably because of a legislative determination that the price of liquor neither significantly deterred consumption nor promoted temperance. A Liquor Study Commission, created in 1971, confirmed in part that determination by finding that the 1969 moratorium of the fair trade law increased competition and resulted in lower prices to the consumer. In its report to the legislature in 1973, the commission declared:

> "In actual practice the statute had altogether different results. By attempting to keep liquor prices artificially high, the statute appeared to protect the interests of existing retail licensees and keep vigorous competition to a minimum. It also gave the distilling and wholesaling levels of the liquor industry near-total authority to administer prices, backed up by the power of the state. It created, in effect, virtually all the characteristics of a monopoly operated for private benefit." [6]

The commission also found that the 1969 and 1971 moratoriums did not eliminate the statutory-induced practice by wholesalers and brand owners of circulating lists of suggested retail prices, and that "[t]his form of 'voluntary fair trade' * * * can be used to perpetuate the price maintenance tradition and provide a shelter from competition." [7]

[6] Liquor Study Commission, Final Report 1973, p. 5.
[7] Id. at p. 7.



Prior to 1969, the statutory scheme did not prevent a distiller or manufacturer from choosing to market his product within the state exclusively through a single wholesaler. This practice of exclusive wholesale dealerships had become entrenched during the years prior to 1969, with the result that the retailer, be he a private businessman or a municipality,[8] in order to sell a particular brand of liquor, was compelled to deal with a particular wholesaler and to pay that wholesaler's price. As the Liquor Study Commission observed, the existence of a relatively few wholesalers, with an apparent market concentration in four of the wholesalers, and the exclusive-brand distribution system provoked the most frequent allegation of monopolistic practices and price fixing against the liquor industry.[9] The trial court found upon ample evidence, as the Liquor Study Commission report indicated, that while there is vigorous competition between distillers and wholesalers in sales to retailers and consumers of particular brands of liquor—that is, *interbrand* competition—, there is no *intrabrand* competition, since each brand of liquor is available from only one wholesaler. In 1969, the legislature attempted to promote intrabrand competition by enacting a statute which prohibited contractual agreements establishing exclusive wholesale distributorships.[10] That statute was inef-

[8] Municipally-owned liquor stores are authorized in Minnesota. Minn. Stat. 340.353.
[9] Liquor Study Commission, Final Report 1973, p. 14.
[10] Minn. St. 1971, § 340.984 (L. 1969, c. 1119, § 5, repealed by L. 1973, c. 664, § 10), provided: "It shall be unlawful for any wholesaler to enter into an agreement with a manufacturer by the terms of which the manufacturer is prohibited from supplying intoxicating liquor to any other wholesaler within the state. Any such agreement, whether entered into before or after June 7, 1969, is hereby declared to be contrary to public policy and void. In addition, the entering into of any agreement prohibited by Laws 1969, Chapter 1119 after the effective date of enactment shall constitute grounds for revocation of a wholesaler's license."

fective since both distillers and wholesalers found it to their advantage to continue the practice of sole distributorships by the distillers, declaring that they had no agreement to do so but simply chose in their discretion to limit sales to a wholesaler of demonstrated loyalty, efficiency, and selling ability.

It was with this background that the 1973 Legislature enacted c. 664. That enactment was accompanied by the repeal of both the fair trade law and § 340.984, prohibiting sole distributorships.[11] The implicit design of c. 664 is to abolish sole distributorships and thereby promote intrabrand price competition by requiring all licensed distillers importing distilled spirits into Minnesota to offer to sell their manufactured product or brands of liquor to all licensed Minnesota wholesalers on an equal basis and at an affirmation price, that is, to sell at the lowest price at which a distiller sells its liquor at wholesale in the United States. The ultimate legislative objective is to ensure that wholesalers can buy at the lowest national price and, by making all distillers' brands available to them, to encourage them by competition to lower prices to retailers. Included in this legislative objective is the hope that retailers, now able to compete with one another for the sale of all brands, will lower prices to Minnesota consumers. Its effect on this state's licensed components of the liquor industry is to prohibit discrimination by distillers in favor of one licensed wholesaler against another; to transfer control over the distribution and sale of the various brands of liquor from the distillers to the wholesalers; and to promote a wider distribution of liquor brands throughout the state by affording re-

[11] Also repealed were residency requirements for wholesalers, Minn. St. 1971, § 340.11, subd. 2, an adoption of the recommendation of the Liquor Study Commission that such was desirable to ensure competition at the wholesale level by removing a barrier to entry into the wholesale level of the market.



tailers the opportunity to purchase a variety of brands from competing wholesalers. This legislation obviously is not desinged to promote temperance, since, if lower consumer prices result, the opposite may occur even though, speculatively, the necessity of distillers or wholesalers to aggressively merchandise various brands by intensive advertising may be diminished and thereby stimulation of consumer buying habits lessened.

Plaintiffs broadly challenge c. 664 on every conceivable constitutional ground. In considering this attack, we must bear in mind the following fundamental principles:

1. The legislature possesses all legislative power not withheld or forbidden by the State or Federal Constitutions. George Benz Sons, Inc. v. Ericson, 227 Minn. 1, 34 N. W. 2d 725 (1948). Courts do not pass upon the soundness of social or economic theories in the legislative mind when statutes are enacted in exercise of the police power, nor can courts substitute their judgment for that of the legislature as to the wisdom, expediency, or effectiveness of this type of regulation. Fairview Hospital Assn. v. Public Bldg. Service Union, 241 Minn. 523, 64 N. W. 2d 16 (1954); Lee v. Delmont, 228 Minn. 101, 36 N. W. 2d 530 (1949). To warrant the judiciary's declaring an act invalid, it must be able to point out some constitutional limitation which the act clearly transcends. State v. Corbett, 57 Minn. 345, 59 N. W. 317 (1894).

2. This act, like every legislative enactment, comes to the courts with a presumption in favor of its constitutionality. Klicker v. State, 293 Minn. 149, 197 N. W. 2d 434 (1972); Head v. Special School Dist. No. 1, 288 Minn. 496, 182 N. W. 2d 887 (1970), certiorari denied sub nom. Minneapolis Federation of Teachers, Local No. 59, v. Spannaus, 404 U. S. 886, 92 S. Ct. 196, 30 L. d. 2d 168 (1971); 17B Dunnell, Dig. (3 ed.)

§ 8929. The burden of proof is on the challenging parties to show beyond a reasonable doubt that the act violates some particular constitutional provision. Minneapolis Federation of Teachers v. Obermeyer, 275 Minn. 347, 147 N. W. 2d 358 (1966).

3. Since all enforcement of the act has been restrained both during trial and pending this appeal, we deal only with whether the challenged provisions are unconstitutional on their face. When an act is challenged on its face, the reviewing court is permitted to consider neither hypothetical applications of the act which might be unconstitutional nor possible constructions of the act which might render it unconstitutional. If a legislative act is reasonably susceptible of two different constructions, one of which will render it constitutional and the other unconstitutional, the former must be adopted. Hassler v. Engberg, 233 Minn. 487, 48 N. W. 2d 343 (1951); State v. Rawland, 294 Minn. 17, 199 N. W. 2d 774 (1972).

4. Finally, and of vital significance, is the Twenty-First Amendment to the Federal Constitution, § 2 of which provides:

> "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

It has been held repeatedly that this amendment has bestowed upon the states broad regulatory powers over liquor importation, recognized as something more than the normal state authority over health, welfare, and morals. State Board of Equalization v. Young's Market Co. 299 U. S. 59, 57 S. Ct. 77, 81 L. ed. 63 (1936); Joseph E. Seagram & Sons, Inc. v. Hostetter, 16 N. Y. 2d 47, 262 N. Y. S. 2d 75, 209 N. E. 2d 701



(1965), affirmed, 384 U. S. 35, 86 S. Ct. 1254, 16 L. ed. 2d 336 (1966); Mahoney v. Joseph Triner Corp. 304 U. S. 401, 58 S. Ct. 988, 82 L. ed. 1424 (1938); United States v. Frankfort Distilleries, Inc. 324 U. S. 293, 65 S. Ct. 661, 89 L. ed. 951 (1945); California v. La Rue, 409 U. S. 109, 93 S. Ct. 390, 34 L. ed. 2d 342 (1972). Thus we have held that no one has the absolute right to engage in selling intoxicating liquors. It is a privilege granted by the licensing authority and subject to the state's police power. George Benz Sons, Inc. v. Ericson, *supra;* Giozza v. Tiernan, 148 U. S. 657, 13 S. Ct. 721, 37 L. ed. 599 (1893). When once licensed, no one can acquire a vested right to continue in a business which is subject to regulation under the police power. Paron v. City of Shakopee, 226 Minn. 222, 32 N. W. 2d 603 (1948); 45 Am. Jur. 2d, Intoxicating Liquors, §§ 115, 116. The Twenty-First Amendment does not, however, empower the states to invade equal-protection and due-process constitutional rights guaranteed by the Fourteenth Amendment. Wisconsin v. Constantineau, 400 U. S. 433, 91 S. Ct. 507, 27 L. ed. 2d 515 (1971); California v. La Rue, *supra;* George Benz Sons, Inc. v. Ericson, *supra;* Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 95 Cal. Rptr. 329, 485 P. 2d 529 (1971). We are mindful that the Twenty-First Amendment does not limit the scope of equal-protection and due-process guarantees of the Minnesota Costitution.[12] However, we apply Fourteenth Amendment standards since we are aware of no compelling reason peculiar to this state which would justify more stringent state standards.

In the light of these fundamentals, we believe that a number of plaintiffs' arguments may be disposed of without lengthy discussion. Plaintiffs argue that there is no guarantee that

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[12] Minn. Const. art. 1, §§ 2, 7; art. 12, § 1.

the benefits of intrabrand competition at the wholesale level will be passed on to consumers; that desirable brands may disappear from Minnesota; that some wholesalers may be unable to compete effectively; that wholesalers' salesmen will lose their employment; and that some brands of liquor will receive no promotion. All these arguments involve the sort of informed prediction and considered decision making that is peculiarly for the legislature rather than the courts. The argument of plaintiff Johnson that two of its distiller suppliers, Federal and Mr. Boston, are required by the act to sell liquor bottled under brands owned by Johnson to all wholesalers is speculative and hypothetical. There is no indication that the liquor commissioner is about to construe the statute in such a way as to invade Johnson's right of ownership in its registered private-brand labels, and the statute on its face clearly does not require such a construction. Plaintiffs also claim constitutionally protected vested property rights in wholesalers based upon their having acquired wholesalers' licenses and having spent money on advertising, salesmen, and the promotion of particular brands of liquor. We hold that no such vested rights in the continuance of the existing distribution system exist and, in addition, observe that it is neither the purpose nor likely effect of this statute to drive any wholesaler out of business.[13]

Plaintiffs also allege an equal-protection discrimination between out-of-state importers and Phillips, which imports bulk liquor into Minnesota, performs rectifying, blending, and bot-

[13] Plaintiffs challenge the trial court's findings of fact, primarily for the reason that the findings fail to recognize the investment of the plaintiffs in building up their business under the existing system of distribution. We have reviewed the findings and the record and find them to be neither incomplete nor clearly erroneous. Rule 52.01, Rules of Civil Procedure; In re Estate of Balafas, 293 Minn. 94, 198 N. W. 2d 260 (1972).



tling operations in Minnesota, and sells the bottled liquor under its own brand labels to wholesalers in other states and to Minnesota retailers as the sole wholesale distributor. They insist that the statute cannot be construed to include Phillips in view of the fact that Phillips does not hold a license under § 340.113 and, under the commission's regulations existing at the time of trial, an "importer" was defined as "any out-of-state distiller."[14] In so arguing, plaintiffs are urging a construction of the statute which would call its constitutionality into question. They insist that Phillips be excluded from the statutory classification "licensed importer" and at the same time insist that such a construction would constitute a violation of equal protection. We find this argument without merit under the fundamental principle of presumed constitutionality previously discussed. See, also, In re Taxes on Property of Cold Spring Granite Co. 271 Minn. 460, 136 N. W. 2d 782 (1965). The trial court's construction of the statute to include Phillips as a "licensed importer" is reasonable. While Phillips does not hold a license under § 340.113, it does hold a license under § 340.11, which explicitly includes the right to import.[15] The trial court found as fact upon undisputed evidence that Phillips does bring liquor into the state and, on that basis and in answer to Phillips' request for declaratory judgment, found that Phillips is included within the statutory classification. Moreover, there is no indication that the commissioner is inclined to adopt regulations which would render unconstitutional the enforcement of the act. The regulations relied upon were in force before the enactment of c. 664, which when en-

[14] State of Minnesota, Dept. of Administration, Regs. Relating to the Administration of the Office of Liquor Control Commissioner, 1970 ed., Definitions, p. 12 See, also, Regs. Liq. 68 and Liq. 70, p. 47.

[15] See footnote 3, *supra*.

forced will require the issuance of new regulations.[16] Mindful of the rule that a statute must be construed to save its constitutionality, we hold the trial court's construction to be correct and consistent with the intent of the legislature and the plain language of the act. Therefore plaintiffs' equal-protection challenge cannot be sustained.

Plaintiffs also urge that the act's exclusion from coverage of wines and malt beverages constitutes an invidious discrimination, rendering the act invalid under equal-protection guarantees. While we recognize that wine, beer, and liquor are similarly distributed and sold, and that liquor may in a broad sense compete with the other two beverages for the consumer dollar, we agree, as the trial court found, that the differences inherent in the products themselves justify the legislative decision to include only distilled spirits within this act. More important is the principle that a law is not to be overthrown because there are other instances to which it might have been applied, and the fact that a statute discriminates does not make the classification invidious if it is founded upon a rational distinction. State v. Pehrson, 205 Minn. 573, 287 N. W. 313 (1939); George Benz Sons, Inc. v. Ericson, *supra*. The Fourteenth Amendment does not compel a legislature to prohibit all the evils or none, and a legislature may hit at an abuse which it has found even though it fails to strike at another. United States v. Carolene Products Co. 304 U. S. 144, 58 S. Ct. 778, 82 L. ed. 1234 (1938). Furthermore, legislative economic

[16] It should be noted that the preface to definitions in the 1974 edition of the liquor control regulations reads as follows: "The adoption, repeal or amendment of any regulation herein shall not be deemed applicable to the enforcement or construction of Minn. Laws 1973 Chapter 664 Section 2 (Minn. Stat. Section 340.114)." Dept. of Administration, Rules and Regs. of the Dept. of Liquor Control, 1970 ed., p. 9.



reform may take one step at a time, addressing itself to that phase of the problem which seems most acute to the legislative mind. Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U. S. 35, 86 S. Ct. 1254, 16 L. ed. 2d 336 (1966); Williamson v. Lee Optical Co. 348 U. S. 483, 75 S. Ct. 461, 99 L. ed. 563 (1955). As the trial court found, the legislature could reasonably determine that the public interest does not require open wholesaling of wines and beers at this time due to differences in requirements for the sale of wines and beers, the absence of significant competition between wines and beers on the one hand and distilled spirits on the other, and the greater number of wholesalers selling wines and beers. The Benz case, heavily relied upon by plaintiffs, is distinguishable, for there the court recognized the broad prerogatives of the legislature in making classifications but failed to discern the purpose of the legislature in separating wine and distilled spirits at the wholesale level.

Finally we come to what we regard as the most serious challenge asserted. Section 2 of the act makes it unlawful for every distiller who chooses to offer his distilled spirits to one Minnesota wholesaler to refuse to sell to all other licensed wholesalers on an equal basis and, it is asserted by necessary implication, creates a presumption that every such refusal except for "arrears on payments for past purchases" is a violation justifying criminal sanctions.

Plaintiffs contend that this provision is an arbitrary and unreasonable exercise of state police power in violation of due-process guarantees. While conceding that the state may legislate to promote the economic welfare of its citizens, plaintiffs, arguing broadly, attack this provision as one having no counterpart in the economic regulation of any other legitimate business and as an oppressive, unwise, and impractical means of

reducing consumer prices, a result, they insist, which has neither been proven nor found by the trial court. More pointedly and with more merit, they argue that this interference with their freedom to deal with respect to their property is overbroad because they claim there are "many legitimate non-monopolistic legally justifiable business reasons" justifying a distiller's refusal to offer to sell to a particular wholesaler which have no bearing on the purpose and objective of the act to promote competition and price reduction to consumers. Enumerated examples of such business reasons are refusing to deal with a wholesaler of unsavory character, with one who employs so-called "footballing" tactics to injure competitors, or with one who has a poor record of promoting the sale of a distiller's brand, or with a wholesaler who is owned by a distiller so that the effect of dealing with him is comparable to "putting the fox in the henhouse." In view of these claimed potential, justifiable reasons to refuse to deal, it is argued that "the act in effect creates compulsory, nonterminable franchises for every licensed wholesaler." Additionally, it is argued that the claimed conclusive presumption inherent in § 2 making every refusal to deal except for credit reasons unlawful is unreasonable and arbitrary because "[a] law which closes a litigant's mouth in court is as bad as a law which deprives him of access to it." Twin City Candy & Tobacco Co. Inc. v. A. Weisman Co. 276 Minn. 225, 231, 149 N. W. 2d 698, 702 (1967). This two-pronged attack thus challenges not only the legislature's power to abolish sole distributorships but the appropriateness of the means chosen to do so.

As a constitutional principle, it is well established that the freedom to contract with respect to one's property and in the conduct of a lawful business to select the party with whom one chooses to do so is a part of the liberty protected by the due-



process clauses of the State and Federal Constitutions. But, as declared in Nebbia v. New York, 291 U. S. 502, 523, 54 S. Ct. 505, 510, 78 L. ed. 940, 948 (1934):

> "* * * [N]either property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest."

It is elementary that the state by virtue of its sovereignty may regulate private conduct for public benefit. In the field of economic regulation, without burdening this opinion by a historical recital of the changing attitude of the nation's courts, it is settled that the legislature is free to adopt whatever economic policy it deems will promote the public good.[17] Where an economic regulation is enacted, the guarantee of due process demands only (1) that the act serve to promote a public purpose; (2) that it not be an unreasonable, arbitrary, or capricious interference; and (3) that the means chosen bear a rational relation to the public purpose sought to be served.

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[17] In Ferguson v. Skrupa, 372 U. S. 726, 729, 83 S. Ct. 1028, 1030, 10 L. ed. 2d 93, 96 (1963), the court said: "* * * Under the system of government created by our Constitution, it is up to legislatures, not courts to decide on the wisdom and utility of legislation. There was a time when the Due Process Clause was used * * * to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy. * * *

"The doctrine * * * —that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws."

See, also, McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 Supreme Court Review 34; Hetherington, *State Economic Regulation and Substantive Due Process of Law*, 53 Nw. U. L. Rev. 13, 53 Nw. U. L. Rev. 226.

Bearing in mind the legislative history of liquor regulation in this state, there exists no basis to invalidate the exercise of police power for the economic purposes of preventing monopolies and promoting competition to lower prices to consumers. Twin City Candy & Tobacco Co. Inc. v. A. Weisman Co. *supra.* The critical question presented is not whether the legislative goal is in the public interest, but rather whether the act is an unreasonable and arbitrary interference with the liquor industry and whether the particular means chosen to achieve the legislative goal infringes upon the distillers' constitutional freedom to refuse to deal with all licensed wholesalers on an equal basis. As previously noted, arguments that this provision is unreasonable, arbitrary, or capricious because it singles out the liquor industry and is oppressive, unwise, and impractical are arguments properly addressed to the legislature.

Nor can we agree that the act in effect creates a compulsory, nonterminable franchise in wholesalers. It neither requires nor compels every distiller, even though licensed, to offer his product to Minnesota wholesalers. Nor does it in any way infringe upon a Minnesota wholesaler's existing right to deal with or buy from a distiller or to deal with or sell to retailers in open, unfettered competition with each other. Its thrust is the elimination of the right to obtain exclusive dealerships by prohibiting all discrimination of distillers among wholesalers and compelling those who offer to sell their brands of liquor to one Minnesota wholesaler to do so to all on an equal basis. Under the existing system, the control of distribution of manufactured liquor is necessarily vested in the distiller or manufacturer. The legislature could readily determine that a distiller's refusal to deal with other than one wholesaler, or a wholesaler's inability to buy from all who bring liquor into



the state, effectively controls the availability of various brands of liquor to the retailer and the ultimate consumer; that supply and demand for a particular brand of liquor affects its price; and that such control over distribution necessarily affects the ultimate price to Minnesota consumers. It is hardly debatable that the legislature could thus reasonably conclude, as the Liquor Study Commission did, that exclusive distributorships portend monopolistic practices, inevitably limit intrabrand competition, and ultimately affect the price to consumers. Equally sound, we believe, is our conclusion that prohibiting discrimination by restricting refusals to deal on an equal basis with all wholesalers is not an arbitrary and unreasonable interference with the liquor industry and bears a rational, if not a substantial, relationship to the economic welfare of the public.

However, the most difficult question remains, namely, whether every prohibited refusal to deal amounts to a constitutionally impermissible conclusive presumption. Assuming that a conclusive presumption is intended, we confront plaintiffs' contention that this is a denial of procedural due process no different from the irrebuttable presumptions denounced in Twin City Candy & Tobacco Co. Inc. v. A. Weisman Co. *supra,* and recently by the United States Supreme Court in Vlandis v. Kline, 412 U. S. 441, 93 S. Ct. 2230, 37 L. ed. 2d 63 (1973), and Cleveland Board of Education v. LaFleur, 414 U. S. 632, 94 S. Ct. 791, 39 L. ed. 2d 52 (1974). In Weisman, we held unconstitutional a legislative attempt to prohibit sales of cigarettes below cost on the ground that a legislative declaration exclusively presuming all sales below cost to be with intent to injure a competitor or destroy competition was unjustified in fact and denied procedural due process. In Vlandis, the United States Supreme Court invalidated a Connecticut

statute which employed a conclusive presumption of nonresidency for the purpose of determining an applicant's qualification for lower tuition charges at the state university, holding (412) U. S. 452, 93 S. Ct. 2236, 37 L. ed. 2d 71):

> "* * * [I]t is forbidden by the Due Process Clause to deny an individual the resident rates on the basis of a permanent and irrebuttable presumption of nonresidence, when that presumption is not necessarily or universally true in fact, and when the State has reasonable alternative means of making the crucial determination."

In LaFleur the court relying on Vlandis reaffirmed its view that irrebuttable presumptions have long been disfavored by the due-process clause. There the court invalidated regulations promulgated by school boards which compelled teachers to take unpaid maternity leaves by employment of a conclusive presumption that every pregnant teacher in the fifth or sixth month of pregnancy is physically incapable of continuing.[18] In each of these cases including the Weisman case the constitutionality of the law as applied was challenged and the conclusive presumption mandated was found to be not necessarily true in fact.[19]

We are not persuaded that the legislature's classifying every refusal to deal as an intentional discrimination violated due process for we are not prepared to hold that such a classification on its face is not necessarily true in fact or that it unreasonably or arbitrarily infringes on a distiller's freedom to contract. Unlike the Weisman case which prohibited all below-cost sales including sales to consumers c. 664 regulates only sales by distillers to wholesalers whose sole reason to purchase is resale not consumption. Furthermore unlike Weisman it is significant that the presumption employed is not designed to establish every refusal as intentionally destructive of competition. Although the ultimate goal of the act read in its entirety is to promote competition the primary intent of the challenged provisions is to eliminate exclusive dealerships by prohibiting predatory discrimination by distillers. The essence of an alleged violation is therefore intentional discrimination not intentional injury to other competing distillers. The latter mischief is effectively prevented at the distillers' level by the requirement of price affirmation which is not and cannot be challenged because an identical requirement was held constitutional in Joseph E. Seagram & Sons Inc. v. Hostetter, *supra*.

In effect what the legislature has done is to classify all non-credit refusals to sell as discriminatory tending to adversely affect open intrabrand competition. Plaintiffs hypothetically claim that a particular refusal may be justifiably discriminatory for other reasons which can have no bearing on such competition. In other words it is argued that a distiller charged with a violation has a constitutional right to rebut the presumption of unlawful discrimination by presenting evidence that such refusal was justified and did not lessen or destroy intrabrand competition.

This of course raises a question of the constitutionality of the act as applied to an assumed state of facts a question which need be answered only when presented in a proper

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[18] See, also, Bell v. Burson, 402 U. S. 535, 91 S. Ct. 1586, 29 L. ed. 2d 90 (1971); Stanley v. Illinois, 405 U. S. 645, 92 S. Ct. 1208, 21 L. ed. 2d 551, (1972); Carrington v. Rash, 380 U. S. 89, 85 S. Ct. 775, 13 L. ed. 2d 675 (1965); Leary v. United States, 395 U. S. 6, 89 S. Ct. 1532, 23 L. ed. 2d 57 (1969); Turner v. United States, 396 U. S. 398, 90 S. Ct. 642, 24 L. ed. 2d 610 (1970).

[19] The proper reach or scope of the contitutional standard denouncing the use of irrebuttable presumption is far from settled since we find no cases invalidating its use in the area of economic regulations except for Twin City Candy & Tobacco Co. Inc. v. A. Weisman Co. 276 Minn. 225, 149 N. W. 2d 698 (1967).

case.[20] The answer to the challenge of overbreadth in our opinion is that the legislature in enacting this provision in pursuit of an economic goal reasonably could declare that in order to abolish exclusive distributorships and to promote intrabrand competition all unjustified refusals to deal shall be deemed discriminatory since any discrimination in fact necessarily frustrates achieving that ultimate goal and its consequent anticipated liquor price reductions. Furthermore the legislature could have determined that allowing other business reasons to be asserted would require establishing rigid statutory standards more appropriately left to enforcement regulations delegated to the commissioner. In answer to the question presented on this appeal it is sufficient to observe that the legislature could find that specifying credit reasons as justifying a refusal to deal will not significantly or unfairly impair or deprive distillers of their right indeed their opportunity to market their products in this state. To assert that a wholesaler's "unsavory" reputation or his employment of the unfair trade practice of "footballing" to destroy competition of equivalent brands justifies refusal not only ignores the liquor commissioner's regulatory power to revoke wholesalers' licenses for just cause including trade practices condemned by Minn. St. 325.04 but also threatens to reinvest the distiller with the control he can now exercise over a wholesaler.

[20] By declining to answer, we do not intimate that a legislative statute by presuming rather than proving may foreclose a distiller charged with a violation from interposing as a defense that his refusal to deal was occasioned by circumstances unrelated to predatory discrimination but occurred for valid reasons, such as a wholesaler's adulteration of a distiller's product or false branding or other like illegal or tortious conduct. Any enforcement of the act by regulations which would employ an irrebuttable presumption is constitutionally offensive to due process as held by Cleveland Board of Education v. LaFleur, 414 U. S. 632, 94 S. Ct. 791, 39 L. ed. 2d 52 (1974); and Twin City Candy & Tobacco Co. Inc. v. A. Weisman Co. 276 Minn. 225, 149 N. W. 2d 698 (1967), and will, we assume, be avoided.



To assert that a wholesaler's inadequate promotion of a distiller's brand justifies refusal is to ignore the reality of both the wholesaler's and retailer's unrestrained freedom to refuse to buy. A distiller's compulsion to offer to sell to a wholesaler owned by a competing distiller is more difficult to evaluate. However, the record shows that both leading wholesalers, Ed Phillips & Sons and Johnson, appear to have suffered no prejudice in marketing their own brands along with competing brands supplied them by their respective distillers.

This analysis, we are satisfied, supports our conclusion that the act is constitutionally valid. To paraphrase the Hostetter court, and without intimating any limitation as to defenses which may be interposed in enforcement, we cannot say that the legislature acted unconstitutionally when it determined to abolish exclusive dealerships; and only by declaring a presumptive limitation on prohibited refusals to deal, coupled with the "no higher than the lowest price" requirement, could the grip of liquor distillers and wholesalers on Minnesota liquor prices be loosened.[21]

We emphasize that our decision upholds the constitutionality of c. 664 only on its face. Plaintiffs' fears that constitutional infirmities will appear upon enforcement must of course await judicial review when and if they arise.

Affirmed.

The original opinion filed on April 4, 1975, is hereby withdrawn and this opinion substituted. The petition for rehearing is denied and the petition for an order for a stay is also denied.

MR. CHIEF JUSTICE SHERAN took no part in the consideration or decision of this case.

MR. JUSTICE OTIS concurs in the substituted opinion and withdraws his dissent.

[21] Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U. S. 35, 86 S. Ct. 1254, 16 L. ed. 2d 336 (1966).

APPENDIX EXHIBIT C

STATE OF MINNESOTA — DISTRICT COURT
County of Ramsey — Second Judicial District

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File No. 391288
Federal Distillers, Inc., Mr. Boston Distiller Corporation, and Johnson Brothers Wholesale Liquor Company,

*Plaintiffs,*

vs.

Joseph Novak, Liquor Control Commissioner of Minnesota and the State of Minnesota,

*Defendants,*

and

Ed Phillips & Sons Company, Griggs, Cooper & Company, Inc., and Raymond Distribution Company, Inc.,

*Intervenors.*

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File No. 392142
Heaven Hill Distilleries, Inc.,

*Plaintiff,*

vs.

Joseph V. Novak, Liquor Control Commissioner of Minnesota,

*Defendant.*

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File No. 392143
Old Peoria Company, Inc.,

*Plaintiff,*

vs.

Joseph V. Novak, Liquor Control Commissioner of Minnesota,

*Defendant.*



File No. 392189
National Distillers & Chemical Corporation,

*Plaintiff,*

vs.

Joseph V. Novak, Liquor Control Commissioner of Minnesota,

*Defendant.*

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FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER FOR JUDGMENT

The above-entitled matters, having been consolidated by Order of the Court dated July 18, 1973, came on for trial before the undersigned, one of the judges of the above-named Court, in Courtroom 1315, Ramsey County Court House, Saint Paul, Minnesota, on September 19, 1973.

APPEARANCES:

FELIX M. PHILLIPS, ESQUIRE, of the firm of SHANEDLING, PHILLIPS, GROSS & AARON, 909 Farmers & Mechanics Bank Building, Minneapolis, Minnesota, appeared representing Plaintiffs Federal Distillers, Inc., Mr. Boston Distiller Corporation, and Johnson Brothers Wholesale Liquor Company.

HYMAN EDELMAN, ESQUIRE, and IRVING R. BRAND, ESQUIRE, of the firm of MASLON, KAPLAN, EDELMAN, BORMAN, BRAND & McNULTY, 1800 Midwest Plaza Building, Minneapolis, Minnesota, appeared representing Intervenor Ed Phillips & Sons Company and Plaintiffs Heaven Hill Distilleries, Inc., Old Peoria Company, Inc., and National Distillers & Chemical Corporation.

LAWRENCE J. HAYES, ESQUIRE, JAMES A. GALLAGHER, ESQUIRE, and WILLIAM J. HASSING, ESQUIRE,

of the firm of MAUN, HAZEL, GREEN, HAYES, SIMON, & ARETZ, 332 Hamm Building, Saint Paul, Minnesota, appeared representing Intervenor Griggs, Cooper & Company, Inc.

HAROLD SHEAR, ESQUIRE, and MARVIN G. LIND, ESQUIRE, of the firm of SHEAR & ROONEY, 938 Minnesota Building, Saint Paul, Minnesota, appeared representing Intervenor Raymond Distribution Company, Inc.

RICHARD H. KYLE, ESQUIRE, of the firm of BRIGGS & MORGAN, W-2262 First National Bank Building, Saint Paul, Minnesota, appeared representing Plaintiff Old Peoria Company, Inc.

JONATHAN H. MORGAN, ESQUIRE, SOLICITOR GENERAL, State of Minnesota, and KENNETH E. RASCHKE, JR., SPECIAL ASSISTANT ATTORNEY GENERAL, State of Minnesota, 160 State Office Building, Saint Paul, Minnesota, appeared representing the Defendants.

Having considered all of the evidence, the arguments and briefs of counsel, and having been fully advised in the premises, the Court upon all files, records, affidavits, memoranda and proceedings herein now makes and enters the following Findings of Fact, Conclusions of Law and Order for Judgment.

FINDINGS OF FACT

1. On May 24, 1973, the Minnesota Legislature duly enacted Minn. Laws 1973, Ch. 664.

2. Ch. 664 provides in part as follows:

"Sec. 2. Minnesota Statutes 1971, Chapter 340, is amended by adding a section to read:

[340.114] [UNLAWFUL DISCRIMINATIONS PROHIBITED.] Subdivision 1. All licensed importers shall offer for sale on an equal basis to all licensed wholesalers



and manufacturers all intoxicating liquor brought into the state of Minnesota.

Subd. 2. Without limiting subdivision 1, the following shall be deemed failures to offer intoxicating liquor for sale on an equal basis and are unlawful:

(a) A refusal to sell any intoxicating liquor to a wholesaler or manufacturer, which if offered for sale to any other wholesaler or manufacturer, except when a wholesaler or manufacturer is in arrears on payments for past purchases from the importer who refuses to sell.

* * *

(f) For purposes of this subdivision and subdivision 1 only, the term 'intoxicating liquor' shall not include 'pop wines' as the same are defined by regulation of the commissioner.

* * *

Subd. 4. Nothing in this section shall apply to any wines or malt beverages regardless of alcoholic content."

3. Pursuant to order of this court (Honorable Stephen Maxwell) dated July 18, 1973, defendants have taken no action for the enforcement of Section 2 of Chapter 664 and have promulgated no rules or regulations directed to the enforcement of that section.

4. Plaintiffs and intervenors in this action fall generally into two groups: (a) foreign corporations which manufacture, rectify, blend, bottle and label liquor for sale to wholesale distributors ("suppliers"), and (b) Minnesota corporations which sell liquor at wholesale in the State of Minnesota ("wholesalers").

The first group (foreign corporations) consists of:

(1) Federal Distillers, Inc., a Massachusetts corporation ("Federal"). Federal sells distilled spirits to Johnson Brothers

Wholesale Liquor Company (Johnson) in Cambridge, Massachusetts. Much of this product is bottled and labeled under brand labels owned by and registered to Johnson. Other such product is bottled and labeled under brands owned by and registered to Federal. The composition of the individual product is not necessarily unique to Johnson. Johnson is the only Minnesota wholesaler to which Federal sells any intoxicating liquor.

(2) Mr. Boston Distiller Corporation, a Massachusetts corporation ("Mr. Boston"). Mr. Boston bottles distilled spirits under brands owned by Johnson and under brands owned by Mr. Boston. Mr. Boston sells such brands only to Johnson in Minnesota.

(3) National Distillers & Chemical Corporation, a Virginia corporation ("National"). National sells branded distilled spirits and wines only to Phillips in Minnesota.

(4) Heaven Hill Distilleries, Inc., a Kentucky corporation ("Heaven Hill"). Heaven Hill sells bulk whiskey to a Minnesota wholesaler (Old Peoria) through Heaven Hill Company (an independent partnership) and then bottles the whiskey at the request of the owner of the bulk whiskey under brands owned by Heaven Hill.

The second group consists of:

(5) Johnson Brothers Wholesale Liquor Company ("Johnson"). Johnson deals in distilled spirits and wine and also deals in wine through two wholly-owned subsidiaries. Johnson has acquired and owns private brand labels under which Federal and Mr. Boston bottle distilled spirits for Johnson. Johnson's labels are registered under State trademark law with the Minnesota Liquor Control Commission and with the Alcohol and Tobacco Division of the U. S. Treasury Department.



(6) Old Peoria Company, Inc., ("Old Peoria"). Old Peoria distributes both distilled spirits and wine in Minnesota.

(7) Griggs, Cooper & Company, Inc., ("Griggs, Cooper"). Griggs, Cooper distributes both distilled spirits and wine in Minnesota.

5. Ed Phillips & Sons Co., ("Phillips"). Phillips falls into both groups since it is both a wholesaler of distilled spirits and wine and performs rectifying and blending of distilled spirits. Phillips is a Minnesota corporation licensed by the State of Minnesota as a manufacturer, wholesaler and importer of intoxicating liquor. Phillips imports bulk whiskey which it then rectifies, blends, bottles and labels with brand labels which are owned by and registered to Phillips. Phillips sells these branded products to retailers in Minnesota and to wholesalers in other states. Phillips also purchases liquor from suppliers outside of Minnesota and resells that liquor at wholesale in Minnesota as the sole wholesale outlet.

6. The originally-named defendants are the State of Minnesota and Joseph V. Novak, Minnesota Liquor Control Commissioner. Certain plaintiffs named only Commissioner Novak as defendant.

7. Raymond Distributing Company, Inc., ("Raymond") intervened as a defendant in the original action. Raymond is a recently organized Minnesota wholesaler licensed in May, 1973, and has unsuccessfully attempted to purchase certain established brands of intoxicating beverages from some suppliers. Raymond could apparently purchase some unknown or lesser established brands of intoxicating beverages, but for certain reasons has not commenced business.

8. No wholesaler has any contract or agreement, oral or written, which provides the wholesaler any continuing right to purchase any brand of liquor. No wholesaler has any agree-

ment that it is or shall be the only distributor of any brand of liquor in Minnesota. However, wholesalers expect to continue to be the sole distributor of a particular brand if their performance, record of sales, and good credit are maintained.

9. All of the foreign corporations which supply the wholesalers are licensed by the Minnesota Liquor Control Commissioner as importers pursuant to Minn. Stat. § 340.113 (1971) and regularly ship products into Minnesota.

10. Federal, Mr. Boston, and Heaven Hill have not obtained and do not presently have any certificates of authority to transact business in the State of Minnesota pursuant to Minn. Stat. § 303.03 (1971).

11. There are ten persons or entities (excluding intervenor Raymond) currently licensed to manufacture, wholesale and import all intoxicating liquors in Minnesota pursuant to Minn. Stat. § 340.11, subd. 2 (1971), including Johnson, Phillips, Old Peoria, and Griggs, Cooper.

12. There are thirteen persons or entities licensed to import and wholesale wines (but not distilled spirits) in Minnesota.

13. There are approximately 210 persons or entities licensed to import and wholesale malt beverages containing more than 3.2% of alcohol by weight in Minnesota.

14. There are approximately 150 persons or entities holding licenses to ship intoxicating liquor into Minnesota pursuant to Minn. Stat. § 340.113 (1971), including Federal, Mr. Boston, Heaven Hill, and National.

15. As a general rule, suppliers have sold each given brand of distilled spirit in Minnesota to only one Minnesota wholesaler for distribution in the State of Minnesota.

16. The plaintiff suppliers sell their products in other states in many varied ways as determined by them or as required by state law.



17. National and local advertising of brands of distilled spirits is normally performed by the supplier, although in some instances certain wholesalers have engaged in rather extensive local advertising at their own expense.

18. Wholesalers attempt to promote the brands sold by them through the efforts of salesmen who call on retailers and seek to convince the retailers to purchase quantities of the brand and to give the brand maximum shelf space and public exposure.

19. Suppliers maintain control over the selling activities of the wholesalers dealing in the suppliers' brands by the possibility of denying a wholesaler the right to purchase a particular brand if the wholesaler's promotional efforts on the brand's behalf do not satisfy the supplier.

20. There is no competition among wholesalers for sales of virtually every brand of distilled spirits in Minnesota. There is, however, vigorous competition among wholesalers for sales of every type or category of distilled spirits in Minnesota.

21. The past existing system of wholesaling of distilled spirits in Minnesota induces wholesalers to emphasize brand promotion and other non-price competition in an effort to continue to sell those brands, rather than to emphasize price, service and efficiency in an effort to secure the business of retailers.

22. It is exceptionally difficult for a wholesaler to begin and maintain a business in Minnesota without the ability to offer for sale brands which are supported by national and local advertising conducted by suppliers and, therefore, well established in the mind of the purchasers.

23. New and prospective wholesalers have been unsuccessful in attempts to obtain such well-established brands

since suppliers will generally sell a well-established brand only to one Minnesota wholesaler.

24. The Minnesota Legislature could reasonably determine that requiring a licensed importer of distilled spirits to sell its products brought into Minnesota to all licensed wholesalers would (a) promote competition among wholesalers on the basis of price, (b) promote efficiency of wholesale operations, (c) de-emphasize non-price competition among wholesalers, (d) lessen the opportunity for control by suppliers over the conduct of the wholesale liquor business in Minnesota, (e) facilitate entry into the wholesale liquor industry, and (f) the effects thereof would tend to promote cost savings and lower prices to retail dealers.

25. There is some price competition among Minnesota liquor retailers, although its extent and benefit to the consumer is a matter of speculation.

26. The Minnesota Legislature could reasonably determine that the benefits of increased wholesale competition will ultimately accrue to the benefit of Minnesota consumers.

27. There is no showing by any wholesaler of any unrecovered investment or effort by such wholesaler which may be attributed to justifiable reliance upon continuing as the sole wholesale distributor of any particular brand or brands of distilled spirits.

28. There is no showing of any past actions by suppliers which were based upon any justifiable reliance upon their continued ability to sell distilled spirits in Minnesota through a single wholesaler.

29. There is no showing that ch. 664 on its face places any unduly burdensome requirements upon licensed importers or that the scope of conduct as regulated by that chapter is inconsistent with the policies and purposes of the Minnesota Legislature in enacting it.



30. The Minnesota Legislature might reasonably have determined that requiring importers and manufacturers of distilled spirits to sell in Minnesota at the lowest national price would secure for Minnesota consumers the benefits of the lowest reasonable liquor prices and would prevent exploitation of Minnesota wholesalers, retailers and consumers.

31. Numerous other states currently require that liquor suppliers sell at lowest affirmed prices. There is no showing that any supplier sells its products at other than uniform national prices or that the price affirmation requirements of ch. 664 will have any detrimental effect whatsoever upon its proper business practices.

32. There is a type or kind of competition in some respects between wines or beers on the one hand and distilled spirits on the other hand, especially with respect to floor space, shelf space and consumer attention. However, consumers exercise a personal choice or taste for any one or more of these products, irrespective of any effort to change their buying habits.

33. Inter-brand competition as induced by a system of exclusive wholesalers does not extend to the promotion of one generic class of liquors as against any other generic class of liquors.

34. The demand for wines is currently expanding greatly in Minnesota and throughout the country. Consequently the wine market is not as stable and entrenched as the market for distilled spirits.

35. Among wines there are many factors contributing to actual differences in kind, quality and use while the quality and makeup of the various brands of a given type of distilled spirit are, in actuality, relatively uniform.

36. Retailers and consumers are often in need of advice and education in the selection and use of wines while such advice and education is not generally necessary with respect to distilled spirits.

37. The Minnesota Legislature could reasonably determine that the public interest does not require statutory provision for open wholesaling of wines and beers at this time, due to the difference in requirements for the sale of wines and beers, the absence of significant competition between wines and beers on the one hand and distilled spirits on the other hand, and the presence of a greater number of wholesalers selling wines and beers.

38. All wholesalers who are parties plaintiff sell both wines and distilled spirits.

39. Exemption of wines and beers from the operation of Section 2 of Chapter 664 will not operate to the prejudice of the competitive market position of any supplier or wholesaler of distilled spirits.

40. Phillips is licensed to import intoxicating liquor into Minnesota.

41. Phillips, in fact, imports and brings distilled spirits into Minnesota which it sells after rectifying, blending, bottling and labeling in Minnesota.

42. All distilled spirits currently sold in Minnesota (whether rectified or blended and bottled in Minnesota or outside Minnesota) are distilled and produced outside the state and imported into the state.

43. The Court does not deem it feasible or appropriate to make any findings in regard to the precise extent of the benefits which will accrue to the Minnesota public as a result of intra-brand competition among wholesalers, or with regard to the likelihood of any effects of such competition, which are



alleged by plaintiffs to be adverse, since such arguments were properly before the Minnesota Legislature in its consideration and passage of Chapter 664. This Act is a proper expression of legislative action and carries the inference that in the judgment of the Minnesota Legislature it would have a salutary and beneficial effect for the citizens of Minnesota.

44. There is absolutely no showing that Chapter 664 was in any way improperly considered or enacted by the Legislature.

## CONCLUSIONS OF LAW

I. Enactment of Chapter 664 by the Minnesota Legislature in all respects constitutes a proper exercise of the police power of the State to regulate the importation, distribution and sale of intoxicating liquor, is based upon reasonable public policy and is not arbitrary, capricious or illegal.

II. Chapter 664 does not operate to deprive any person of life, liberty or property without due process of law contrary to any provision of the Constitution of the United States or the State of Minnesota.

III. Chapter 664 does not operate in an unconstitutionally overbroad manner.

IV. No classification or distinction made by Chapter 664 is shown to be improper, unreasonable or without conceivable basis, or to operate as special legislation or a denial of equal protection of the laws contrary to any provision of the Constitution of the United States or the State of Minnesota.

V. Ed Phillips & Sons Co. is a "licensed importer" of intoxicating liquor within the meaning of Section 2 of Chapter 664 and as such is required to offer such liquor for sale on an equal basis to all Minnesota wholesalers whether such liquor is rectified or blended and bottled within or without the state.

VI. Any questions regarding the requirements of the Act upon suppliers who bottle liquor under brand labels owned and controlled by the purchaser of such liquor are premature, hypothetical and not properly raised in this action.

VII. Laws of Minnesota 1973, Chapter 664, was lawfully and validly considered and enacted by the Minnesota Legislature and signed by the Governor.

VIII. Laws of Minnesota 1973, Chapter 664, is in all respects constitutional, valid and enforceable.

IX. The Order of Judge Maxwell dated July 18, 1973, prohibiting enforcement action and promulgation of rules consistent with Chapter 664 should be and the same is hereby dissolved.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated at Saint Paul, Minnesota, this 26th day of December, 1973.

HAROLD W. SCHULTZ
Judge of the District Court

MEMORANDUM

The foregoing Findings of Fact, Conclusions of Law and Order for Judgment would adequately indicate the position of the Court with respect to its conclusion and judgment in these cases. However, a few comments with respect to some of the issues raised in these cases might be in order.

One of the issues raised by the pleadings in this case on the part of the plaintiffs and intervenors was that the amendment to the law by the Minnesota legislature in 1973 was invalid because the law was not properly passed. It needs no further comment and it is evident that plaintiffs and intervenors abandoned this particular claim and no testimony was presented to show that there was anything relative to the actions



of the legislature in the manner in which the law was passed to make it null and void.

The essence of the action simply involves an attack upon the constitutionality of Chapter 664, Laws of Minnesota 1973. The particular aspects of Chapter 664 are the requirement that licensed importers offer for sale on an equal basis to all licensed wholesalers and manufacturers all intoxicating liquor brought into the State of Minnesota and the part of the law that states that these importers must offer for sale their product at a price no higher than that charged for the product in any other state with the exception of adjustment for freight rates. To some extent, also, an issue was made of a discriminatory practice in that Chapter 664 does not apply the same language to the sale of malt beverages or beer and/or wines.

The plaintiffs having made the claim that Chapter 664 is unconstitutional have the burden of proving that claim, and it is apparent that the Court concludes that they have failed in that burden and have not proved their claim.

It was apparent that the legislature simply felt that the practice of exclusive wholesale representation in Minnesota discourages price competition, prevents new wholesalers from entering into the industry, and that the changes in the law as contained in Chapter 664 is a reasonable and legal method of trying to promote price competition, encouraging efficient operations, and allowing new entries into the industry.

For whatever reasons that the legislature chose to exclude malt beverages or beer and wines from this chapter, it seemed apparent that there was enough of a difference and distinction to merit the legislature proceeding first as it did with those engaged primarily in the business of importing, manufacturing, and wholesaling distilled spirits.

Without attempting to cite any particular cases, the conclusion that the liquor industry has always been peculiarly and distinctively subject to governmental regulation through the police power of the state is so well established so that further documentation by cases should not be necessary.

Peculiarly enough, the same case, *George Benz Sons, Inc. v. Ericson*, 227 Minn. 1, 34 N.W.2d 725 (1948), was relied on by both plaintiffs and defendants in support of their particular position. In the opinion of the Court, that case gives the plaintiffs and intervenors no comfort and cannot be relied upon to sustain plaintiffs' position.

The Court heard this matter as a court case. Therefore, it was charged with the responsibility of determining on the basis of the evidence the facts and applying the law as determined by the Court to those facts in reaching a judgment.

Plaintiffs' contentions with respect to what the evidence indicated as far as a basis or foundation for a finding that their rights of due process have been violated or that the statute is overbroad simply have not been met and did not convince the Court.

All of the cases cited by all counsel with respect to the question of due process of the law have been read and, in the opinion of the Court, do not sustain plaintiffs' burden of proof as to that claim.

There was no proof as to what has been done to date by Chapter 664, as it has not been enforced, and any claim as to what its effect would be in the future is speculative. In the judgment of the Court the claims of the defendants, State of Minnesota and Joseph V. Novak, Liquor Control Commissioner, are entitled to as much or more weight with respect to the future operations of this statute as the claims of the plaintiffs.



This case was well tried by competent, capable counsel on all sides. Excellent briefs and memoranda were furnished to the Court, and the Court has had the benefit of a great deal of expertise on the part of all counsel engaged in this matter to date. All counsel have vigorously and capably represented their clients. What this matter simply does is to present in rather sharp focus a question as to whether or not the first rather drastic and significant change in the laws regulating the importation, wholesaling, and manufacturing of distilled spirits is a legal and constitutional exercise of the legislature's prerogatives to regulate this industry.

What the legislature did was to state that no longer would there be exclusive or sole distributorships. This is a practice that either is beneficial, or an evil that does not allow price competition, depending upon your point of view. The legislature intends to change this practice because it concluded such a practice was of no benefit to the citizens of this state. They further stated, with respect to the lowest price at which the product is sold in any other state, that the only distinction now should be any differential in freight rates rather than a differential caused by any other reason as far as the price of the product is concerned.

The legislature further chose not to impose the same provisions of this law upon those engaged in the business of malt beverages or beer or wine.

In spite of the vigorous arguments raised by plaintiffs and intervenors that on all of these issues they are entitled to judgment, they have not indicated to the Court sufficient either by way of evidence or briefs with respect to the law to sustain their burden of proof. The judgment and actions of the legislature in enacting these amendments to the law must be upheld.

SCHULTZ, J.

APPENDIX EXHIBIT D

STATE OF MINNESOTA
SUPREME COURT

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Federal Distillers, Inc., Mr. Boston Distillers Corporation, and Johnson Brothers Wholesale Liquor Company,

*Respondents-Appellants,*

vs. 44831, 44837, 44844

State of Minnesota and Joseph Novak, Liquor Control Commissioner of Minnesota,

*Respondents,*

Ed Phillips & Sons Co., Intervenor,

*Appellant-Respondent,*

Griggs, Cooper & Co., Inc., Intervenor,

*Respondent-Appellant,*

Raymond Distributing Co., Inc., Intervenor,

*Respondent.*

and

Old Peoria Company Inc., Heaven Hill Distilleries, Inc., and National Distillers & Chemical Corporation,

*Appellants,*

vs. 44832, 44833, 44834

Joseph Novak, Liquor Control Commissioner of Minnesota,

*Respondent.*

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the order of the Court below, herein appealed from, to-wit, of the



District Court within and for the County of Ramsey, be and the same hereby is in all things affirmed.

Dated and signed June 3, 1975.

By the Court:

Attest:

JOHN McCARTHY, Clerk

---

APPENDIX EXHIBIT E

IN THE
SUPREME COURT OF THE UNITED STATES

---

Term, 1975

No. .....

---

GRIGGS, COOPER & CO., INC.,

a Minnesota corporation,

*Intervenor-Appellant,*

vs.

JOSEPH NOVAK, Liquor Control Commissioner of Minnesota, and the STATE OF MINNESOTA,

*Defendants-Respondents,*

FEDERAL DISTILLERS, INC., MR. BOSTON DISTILLER CORPORATION and JOHNSON BROTHERS WHOLESALE LIQUOR COMPANY,

*Plaintiffs-Respondents,*

ED. PHILLIPS & SONS CO. and RAYMOND DISTRIBUTING COMPANY, INC.,

*Intervenors-Respondents.*

---

NOTICE OF APPEAL

Notice is hereby given that Griggs, Cooper & Co., Inc., Intervenor-Appellant above named, hereby appeals to the Supreme

Court of the United States from the final judgment of the Supreme Court of the State of Minnesota entered in this action on June 3, 1975, pursuant to an Opinion of the Supreme Court of Minnesota dated May 2, 1975, affirming a prior order of the District Court, Second Judicial District, Ramsey County Minnesota, dated December 26, 1973, upholding Minnesota Statutes, Chapter 664 (1973) as constitutional.

This appeal is taken pursuant to 28 U.S.C.A. §1257(2).

Dated June 3, 1975.

LAWRENCE J. HAYES
WILLIAM J. HASSING
JAMES A. GALLAGHER
RICHARD M. GAALSWYK
MAUN, HAZEL, GREEN,
HAYES, SIMON AND ARETZ
332 Hamm Building
St. Paul, Minnesota 55102
Attorneys for Griggs, Cooper &
Co., Inc.

Supreme Court, U. S.
FILED
SEP 27 1975
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

October Term 1975

No. [redacted], 75-305

73-315
HEAVEN HILL DISTILLERIES, INC.,
*Appellant,*
vs.
JOSEPH NOVAK, Liquor Control Commissioner of Minnesota,
*Appellee,*
and
OLD PEORIA COMPANY, INC.,
*Appellant,*
vs.
JOSEPH NOVAK, Liquor Control Commissioner of Minnesota,
*Appellee.*

75-305
GRIGGS, COOPER & CO., INC.,
*Intervenor-Appellant,*
vs.
JOSEPH NOVAK, Liquor Control Commissioner of Minnesota, and the STATE OF MINNESOTA,
*Defendants-Respondents.*

## MOTION TO DISMISS OR AFFIRM

Of Counsel:

THOMAS H. JENSEN
Special Assistant
Attorney General

STEPHEN SHAKMAN
Special Assistant
Attorney General

WARREN SPANNAUS
Attorney General
State of Minnesota

PETER W. SIPKINS
Solicitor General
160 State Office Building
Saint Paul, Minnesota 55155
Telephone: (612) 296-2961
*Attorneys for Appellees*

224-7633 — Ruvin Publishing Co., 257 E. 6th St., St. Paul, Minn. 55101 — 224-7633

TABLE OF CONTENTS


| | PAGE |
|---|---|
| CITATION TO OPINION BELOW | 2 |
| QUESTION PRESENTED | 2 |
| I. Statement | 2 |
| II. Argument | 5 |
| A. Introduction | 5 |
| B. The Act Does Not Violate Due Process of Law | 8 |
| 1. Chapter 664 Neither Creates an Impermissible "Conclusive Presumption" Nor Is It Overbroad in Operation | 8 |
| 2. The Act Is Not an Impermissible Interference With Any "Property" or "Liberty" Rights | 11 |
| 3. Other Due Process Claims | 14 |
| C. Chapter 664 Is Not Violative of the Equal Protection Clause | 15 |
| 1. The Exclusion of Wines and Malt Beverages From the Operation of Chapter 664 Is Wholly Proper | 15 |
| 2. The So-called "Private "Brand" Distinction | 17 |
| D. Summary | 18 |
| CONCLUSION | 18 |

## TABLE OF STATUTES AND CONSTITUTIONAL PROVISIONS CITED


PAGE

*United States Constitution:*

U.S. Const. Amend. XXI ..... 5, 6

U.S. Const. Amend. XII, § 2 ..... 6

*Minnesota Statutes:*

Minn. Stat. § 325.04 (1974) ..... 14

Minn. Stat. § 340.13, subd. 13 (1974) ..... 12

Minn. Stat. § 340.141 (1974) ..... 14

Minn. Stat. § 340.142 (1974) ..... 14

Minn. Stat. § 340.19 (1974) ..... 14

Minn. Stat. § 340.984 (1971) ..... 4

Minn. Laws 1969, ch. 119, § 5 ..... 4

Minn. Laws 1973, ch. 664 ..... *passim*

Minn. Laws 1973, ch. 664, subd. 1 (codified as Minn. Stat. § 340.114, subd. 1 (1974)) ..... 3

Minn. Laws 1973, ch. 664, § 2 (codified as Minn. Stat. § 340.114 (1974) ..... 2

Minn. Laws 1973, ch. 664, subd. 2(a) (codified as Minn. Stat. § 340.114, subd. 2(a) (1974)) ..... 3

Minn. Laws 1973, ch. 664, subd. 4 (codified as Minn. Stat. § 340.114, subd. 4 (1974)) ..... 3

*United States Statutes:*

42 U.S.C. § 2000(a), *et seq.* (1964) ..... 9

*Cases:*

Advance-Rumely Thresher Co. v. Jackson, 287 U.S. 283 (1932) ..... 13

American Federation of Labor v. American Sash & Door Co., 335 U.S. 538 (1949) ..... 17





PAGE

Baxley v. Alabama Dairy Commission, 360 F. Supp. 1159 (M. D. Ala. 1973) ..... 13

California v. LaRue, 409 U.S. 109 (1972) ..... 6

Carter v. Commonwealth of Virginia, 321 U.S. 131 (1944) ..... 7

Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974) ..... 10

Day-Brite Lighting, Inc. v. State of Missouri, 342 U.S. 421 (1952) ..... 13

Federal Distillers v. State, —— Minn. ——, 229 N.W.2d 144 (1975) ..... 2, 8, 11, 14

Ferguson v. Skrupa, 372 U.S. 726 (1963) ..... 13, 16

George Benz Sons, Inc. v. Ericson, 227 Minn. 1, 34 N.W.2d 725 (1948) ..... 12

Giozza v. Tiernan, 148 U.S. 657 (1893) ..... 12

Indianapolis Brewing Co. v. Liquor Control Commission, 305 U.S. 391 (1939) ..... 7

Katzenbach v. McClung, 379 U.S. 294 (1964) ..... 9, 10, 11

Keystone Collection Service Inc. v. Recio, 389 F. Supp. 164 (D.P.R. 1975) ..... 13

Mahoney v. Joseph Triner Corp., 304 U.S. 401 (1938) ..... 6, 7

Malito v. Marcin, 14 Ill. App. 3d 658, 303 N.E.2d 262 (1973), *appeal dismissed for want of a substantial federal question*, 417 U.S. 963 (1974) ..... 12

Nebbia v. New York, 291 U.S. 502 (1934) ..... 12, 13

North Dakota State Board of Pharmacy v. Snyder's Drug Stores, 414 U.S. 156 (1973) ..... 13

Olsen v. State of Nebraska, 313 U.S. 236 (1941) ..... 13

| | PAGE |
|---|---|
| Paron v. City of Shakopee, 226 Minn. 222, 32 N.W.2d 603 (1948) | 12 |
| Roschen v. Ward, 279 U.S. 337 (1929) | 16 |
| Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35 (1966) | 5, 6, 7, 14 |
| Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608 (1935) | 9, 10, 11, 16 |
| State Board of Equalization v. Young's Market Co., 299 U.S. 59 (1936) | 6, 7 |
| Tigner v. State of Texas, 310 U.S. 141 (1940) | 16 |
| Twin City Candy & Tobacco Co., Inc. v. A. Weisman Co., 276 Minn. 225, 149 N.W.2d 698 (1967) | 11 |
| United States v. Carolene Products Co., 304 U.S. 144 (1938) | 11 |
| United States v. Darby, 312 U.S. 100 (1941) | 9 |
| United States v. Frankfort Distilleries, 324 U.S. 293 (1945) | 6 |
| United States Department of Agriculture v. Murray, 413 U.S. 508 (1973) | 10 |
| Vlandis v. Kline, 412 U.S. 441 (1973) | 10 |
| Wickard v. Filburn, 317 U.S. 111 (1942) | 9 |
| Williamson v. Lee Optical of Oklahoma, 348 U.S. 483 (1955) | 16, 17 |
| *Rules of Court:* | |
| United States Supreme Court Rule 16(1) | 1 |




IN THE

# Supreme Court of the United States

October Term 1975

No. 73-315, 75-305

73-315
HEAVEN HILL DISTILLERIES, INC.,
*Appellant,*
vs.
JOSEPH NOVAK, Liquor Control Commissioner of Minnesota,
*Appellee,*
and
OLD PEORIA COMPANY, INC.,
*Appellant,*
vs.
JOSEPH NOVAK, Liquor Control Commissioner of Minnesota,
*Appellee.*

75-305
GRIGGS, COOPER & CO., INC.,
*Intervenor-Appellant,*
vs.
JOSEPH NOVAK, Liquor Control Commissioner of Minnesota, and the STATE OF MINNESOTA,
*Defendants-Respondents.*

## MOTION TO DISMISS OR AFFIRM

Appellees respectfully move, pursuant to Rule 16(1) of the Rules of this Court, that the appeals herein be dismissed or, in the alternative, that the judgment of the Supreme Court of Minnesota be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to require further argument.

## BRIEF IN SUPPORT OF MOTION

## CITATION TO OPINION BELOW

Although the opinion of the Minnesota Supreme Court has not yet been officially reported in the *Minnesota Reports*, it is reported at 229 N.W.2d 144 (Minn. 1975).[1]

## QUESTION PRESENTED

Is there a substantial federal question as to the validity of Minn. Laws 1973 Chapter 664, which was enacted by the Minnesota Legislature in the exercise of the State's police power and within its broad range of authority over the traffic and importation of intoxicating liquors into the State.

## I.

## STATEMENT

This is an appeal from the decision of the Minnesota Supreme Court upholding the constitutionality of Minn. Laws 1973 Chapter 664, § 2.[2] As its essence, the Act regulates the

[1] We note that appellants continuously refer to "two" opinions of the Minnesota Supreme Court. See, for example, Appendix Exhibits A and B of Appellant Griggs, Cooper & Co. (A-1 and A-26). Of course, only one opinion of the court, that dated May 2, 1975, is official and on appeal here, and it is a unanimous, *en banc* opinion which now incorporates the views of the *one* previously dissenting Minnesota Justice.

[2] Codified as Minn. Stat. § 340.114 (1974). Throughout this brief, that statute shall be referred to as "Chapter 664" or simply as the "Act." The text of the Act is set forth in the Combined Jurisdictional Statement of Appellants Heaven Hill Distilleries, Inc. and Old Peoria Company, Inc. (hereinafter referred to as "Heaven Hill Jurisdictional Statement") at 3-5 and the Jurisdictional Statement of Griggs, Cooper & Co., Inc. (hereinafter referred to as "Griggs, Cooper Jurisdictional Statement") at 3-4.



distribution of intoxicating liquors as they enter the State of Minnesota.[3] The Act applies *only* to licensed importers of intoxicating liquors[4] and establishes several requirements which they must meet in order to sell their products in the State of Minnesota. Insofar as pertinent here, the Act requires all licensed importers doing business in Minnesota to sell their product on an equal basis to all licensed Minnesota manufacturers and wholesalers.[5] It further provides that a licensed importer doing business in this State may refuse to sell to a manufacturer or wholesaler only if the prospective purchaser is in arrears in the payment of sums due to the importer refusing to make the requested sale.[6]

Several important facts concerning the Act and its adoption by the Minnesota Legislature should be noted here. It is initially important to underscore the practice of exclusive wholesale distributorship of intoxicating liquor which existed in Minnesota prior to the adoption of Chapter 664. Historically, each licensed out-of-state importer of intoxicating liquor[7] sold its brands to only one Minnesota wholesaler. Thus, a retailer which desired to sell a particular brand of liquor could obtain that brand from only one of the ten wholesalers[8] which

[3] Liquor is distributed in Minnesota according to the so-called "three-tier" system of distribution. That is, licensed out of state importers sell their products to licensed in-state Minnesota wholesalers, who in turn sell to retailers.

[4] The Act exempts wines and malt beverages from its coverage. Minn. Laws 1973 Chapter 664, subd. 4. (Minn. Stat. § 340.114, subd. 4 (1974).)

[5] Minn. Laws 1973 Chapter 664, subd. 1. (Minn. Stat. § 340.114, subd. 1 (1974).)

[6] Minn. Laws 1973 Chapter 664, subd. 2(a). (Minn. Stat. § 340.114, subd. 2(a) (1974).)

[7] There are approximately 150 persons or entities licensed to import intoxicating liquor into the State of Minnesota. Appendix to Griggs, Cooper Jurisdictional Statement at A-58.

[8] Prior to the enactment of Chapter 664, 10 wholesalers were actively engaged in the sale of intoxicating liquor. Two additional wholesalers are now licensed, but not actively doing business pending the outcome of this litigation.

were licensed to do business in the State of Minnesota. The natural effect of this scheme of exclusive wholesale distribution was the complete foreclosure of any *intrabrand* competition among wholesalers.

As the Minnesota Supreme Court pointed out in the opinion below, the enactment of Chapter 664 is the Legislature's second attempt to prohibit the exclusive wholesale distribution of intoxicating liquor. The first legislative effort to do so occurred in 1969 with the passage of Minn. Stat. § 340.984 (1971).[9] That statute was designed to establish intrabrand competition by prohibiting the then common practice of establishing a scheme of exclusive wholesale distribution through agreements between wholesalers and importers. That statute was unsuccessful in meeting its objective, since the licensed importers and wholesalers continued *sans* formal agreement the very practice which the 1969 Legislature had in effect determined to be inimical to the public policy.

Thus, wholesalers and importers of intoxicating liquors continued to maintain their scheme of exclusive wholesale distribution of intoxicating liquor. Minnesota consumers continued to be deprived of the benefits of intrabrand competition as a result of the brand monopolies which arose from that exclusive distribution system. The Minnesota Legislature responded to these economic evils in the State's intoxicating liquor industry by enacting Chapter 664.

---

[9] Minn. Laws 1969, ch. 1119, § 5. This enactment, which was repealed by the Act under challenge here, provided:

> It shall be unlawful for any wholesaler to enter into an agreement with a manufacturer by the terms of which the manufacturer is prohibited from supplying intoxicating liquor to any other wholesaler within the state. Any such agreement, whether entered into before or after June 7, 1969, is hereby declared to be contrary to public policy and void. In addition, the entering into of any agreement prohibited by Laws 1969, Chapter 1119 after the effective date of enactment shall constitute grounds for revocation of a wholesalers license.



## II.

## ARGUMENT

Here and in the state courts below, appellants have attacked Chapter 664 on almost every conceivable constitutional ground. Their arguments, however, are either plainly unmeritorious or raise no issue which has not been put to rest by this Court. Plenary consideration of this appeal is unwarranted in light of the unsubstantiality of the issues raised by appellants.

### A. INTRODUCTION.

Although appellants have attempted to do so, the importance of the Twenty-first Amendment to the United States Constitution to the issues in this appeal cannot be ignored. "Consideration of any state law regulating intoxicating beverages must begin with the Twenty-first Amendment. . . ." *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 41 (1966). The plain language of the Twenty-first Amendment and relevant decisions of this Court establish the transparent nature of appellants' arguments and dictate that this motion should be granted.

The Twenty-first Amendment reserves to the states broad powers over the regulation of intoxicating liquor. It provides in pertinent part that:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

U. S. Const. Amend. XXI, § 2. This Court has often recognized ". . . the state's full authority to determine the conditions upon which liquor can come into its territory and what will be done with it after it gets there. . . ." *United States v. Frankfort Distilleries*, 324 U.S. 293, 299 (1945). *See e.g., California v. LaRue*, 409 U.S. 109 (1972); *Joseph E. Seagram & Sons v. Hostetter, supra; Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1938); *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936). Indeed, the Court has acknowledged that the Twenty-first Amendment broadens the scope of a state's police power over intoxicating liquor and is the source of an added presumption as to the validity of state laws regulating the liquor traffic. *California v. LaRue, supra.*

In this case, the Court is faced with a challenge to a statute which is an admitted exercise of the police power of the State of Minnesota—regulation of liquor distribution at the time of entry of the product into the State in furtherance of the economic well-being of its citizens—and which regulates the liquor industry as a commercial enterprise. Contrary to the assertions of appellants, Chapter 664 is not a regulation of important *individual* rights in the guise of liquor regulation; it relates solely to economic issues and it operates squarely within the realm preserved for the states by the Twenty-first Amendment. In short, it sets restrictions upon the importation of liquor into the State, precisely as contemplated by the Twenty-first Amendment.

The arguments which appellants make in justification of their disregard of the relevance to this appeal of the Twenty-first Amendment are without substance. First, the fact that Chapter 664 is not a "temperance" measure is of no moment. This Court has expressly recognized that:



> . . . nothing in the Twenty-first Amendment or any other part of the Constitution requires that state laws regulating the liquor business be motivated exclusively by a desire to promote temperance.

*Joseph E. Seagram & Sons, Inc. v. Hostetter, supra*, 384 U.S. at 47. *See also, State Board of Equalization v. Young's Market Co., supra*, 299 U.S. at 63.[10] Second, as previously noted, the Act is not a guise whereby the State is seeking to regulate conduct other than the distribution of intoxicating liquor. Third, as in all other areas of state economic regulation, this Court long ago made clear that it will not make inquiry into the "reasonableness" or "wisdom" of State statutes regulating intoxicating liquor. *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 46-47 (1966); *Mahoney v. Joseph Triner Corporation*, 304 U.S. 401, 404 (1938). *See also, Carter v. Commonwealth of Virginia*, 321 U.S. 131, 142 (1944) (Mr. Justice Frankfurter, concurring).

Chapter 664 draws constitutional vitality and support from the Twenty-first Amendment and the prior decisions of this Court. And while it is apparent from those decisions that there can exist no serious question as to the validity of that statute, it is also clear that analysis of the arguments raised by appellants (undertaken, as it should be, in the light of the foregoing constitutional principles) leads ineluctably to the conclusion that no substantial questions are presented in this appeal.

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[10] We suggest that the decisions of the Court in Indianapolis Brewing Co. v. Liquor Control Commission, 305 U.S. 391 (1939) and Joseph S. Finch & Co. v. McKittrick, 305 U.S. 395 (1939) also indicate that the Twenty-first Amendment does not require that state regulation of intoxicants be geared to the promotion of temperance. In both cases, this Court upheld state statutes designed to retaliate against states which discriminated against locally-produced intoxicating beverages.

## B. THE ACT DOES NOT VIOLATE DUE PROCESS OF LAW.

### 1. Chapter 664 Neither Creates an Impermissible "Conclusive Presumption" Nor Is It Overbroad in Operation.

In two closely related, if not entirely overlapping arguments, appellants contend that by limiting the circumstances in which an importer may refuse to sell its product to the single instance where a wholesaler or manufacturer is in arrears on payments due that importer, the legislature has enacted a statute which is overbroad in scope and which creates a "conclusive presumption" that all other "refusals to deal" are grounded in anticompetitive motives.[11] These arguments fail for at least two reasons.

Initially, we must admit to some difficulty in ascertaining any "presumption" in the Act. Chapter 664 obviously regulates the *importation of liquor into Minnesota* and establishes the State's policy regarding the distribution of intoxicating liquor. As such, it sets certain conditions which must be met by those who import intoxicating liquor into the State. The Act does not "presume" anything; instead, it precludes certain conduct entirely and it merely defines what is expected of licensed importers doing business in the State of Minnesota.[12]

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[11] Heaven Hill Jurisdictional Statement at 30-42; Griggs, Cooper Jurisdictional Statement at 14-20.

[12] We note here that the Minnesota Supreme Court did not decide that Chapter 664 creates any presumption. Rather, the Court considered appellants' arguments on that point *on the assumption* that a presumption was intended by the statute. *See,* Federal Distillers v. State, —— Minn. ——, 229 N.W.2d 144, 158 (1975); Appendix to Griggs, Cooper Jurisdictional Statement at A-47. In this regard, Appellants' arguments are identical to those of an individual challenging the legality of any mile-per-hour speed limit on the grounds that he conceivably may travel at greater speeds without intending to endanger the public or waste fuel and therefore the law establishing that speed limit creates an impermissible conclusive presumption as to those or other hypothetical factors.



More importantly, appellants' "presumption" and overbreadth arguments are simply incorrect. This Court has often stated the rule that a legislative body is ". . . entitled to recognize the general effects of a practice and forbid it by general rule, even though the generality may not be true in all particulars." *Semler v. Oregon State Board of Dental Examiners,* 294 U.S. 608, 613 (1935). *See also, Katzenbach v. McClung,* 379 U.S. 294 (1964); *Wickard v. Filburn,* 317 U.S. 111 (1942); *United States v. Darby,* 312 U.S. 100 (1941). In this case, the Minnesota Legislature determined that the general effect of the practice of exclusive liquor wholesaling was detrimental to a desirable public goal—intrabrand competition among wholesalers.

Thus, even assuming that single incidents of refusals to sell would not be deleterious to such competition (a questionable assumption given the small number of concerns licensed to wholesale liquor in Minnesota) or that an importer may not intend to reduce competition by particular refusals to sell, the Minnesota Legislature was fully justified in enacting the "sell-to-all" provisions of Chapter 664. Indeed, that conclusion follows from the holding of this Court in *Katzenbach v. McClung, supra.* There, in a challenge to the 1964 Civil Rights Act (42 U.S.C. §2000(a), *et seq.*) as it applied to a small Georgia restaurant, it was argued that:

> . . . Congress has arbitrarily created a conclusive presumption that all restaurants meeting the criteria set out in the act "affect commerce." Stated another way, they object to the omission of a provision for a case-by-case

> determination—judicial or administrative—that racial discrimination in a particular restaurant affects commerce.

*Katzenbach v. McClung, supra,* 379 U.S. at 302-303. This Court rejected that argument, concluding that there was a rational basis for the Congressional judgment:

> . . . Congress has determined for itself that refusals of service to Negroes have imposed burdens both upon the interstate flow of food and upon the movement of products generally. Of course, the mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by this Court. *But where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary for the protection of commerce, our investigation is at an end.*

*Id.* at 303-304 (emphasis added).

It is clear that the Minnesota Legislature acted rationally in establishing and taking steps to preserve intraband competition at the wholesale level by requiring importers to sell to all creditworthy wholesalers. The decisions of this Court in *McClung, Semler,* and the other cases cited above sustain the validity of the course of action chosen by the legislature to effectuate the legitimate State policy defined in Chapter 664.

The authorities upon which appellants rely [13] for their argument that Chapter 664 creates an impermissible conclusive presumption are inapposite here. Those cases are distinguishable because each dealt with situations wherein important *individual* rights were decided on the basis of a presumed fact of low probable accuracy. The present regulatory scheme, like that involved in *Katzenbach v. McClung, supra,* and *Semler v. Oregon State Board of Dental Examiners, supra,* concerns economic affairs and therefore is valid since it is rationally based. *See, United States v. Carolene Products Co.,* 304 U.S. 144 (1938).

Likewise, appellants have cited no persuasive authority in support of their overbreadth argument. It appears, in fact, that they rely almost entirely upon the decision of the Minnesota Supreme Court in *Twin City Candy & Tobacco Co., Inc. v. A. Weisman Co.,* 276 Minn. 225, 149 N.W.2d 698 (1967), a decision which that same court expressly held to be inapplicable to this case.[14]

### 2. The Act Is Not an Impermissible Interference With Any "Property" or "Liberty" Rights.

Appellants have also asserted that Chapter 664 destroys without due process of law a claimed "vested property right" in the continuation of their businesses and violates a claimed "liberty" to refuse to deal with those not of their choosing. Neither argument has merit.

The appellant-wholesalers' claim of a vested right to continue in the liquor business is not only contrary to the law of

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[13] They rely primarily on the decisions of the Court in Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974) and Vlandis v. Kline, 412 U.S. 441 (1974).

In addition to what has been said above, it is clear that the Court's regard of the seriousness of the questions raised by an irrebuttable presumption is in direct proportion to the importance of the *individual* right affected. *See,* United States Department of Agriculture v. Murry, 413 U.S. 508, 517-518 (1973) (Mr. Justice Marshall, concurring); Vlandis v. Kline, 412 U.S. 441, 459 (1973) (Mr. Justice White, concurring).

[14] Federal Distillers, Inc. v. State, —— Minn. ——, 229 N.W.2d 144, 159 (1975); Appendix to Griggs, Cooper Jurisdictional Statement at A-49.

this State,[15] but is singularly unconvincing in the fact that *Chapter 664 does not require them to do anything.* The Act gives all wholesalers the right to purchase all brands of liquor imported into Minnesota; it does not require them to make such purchases; it does not require them to alter marketing practices; it does not require them to purchase products from new sources; it does not require them to discharge salesmen. In short, the Act does not require any change in any wholesaler's pre-existing business practice.[16]

The claim that Chapter 664 unconstitutionally infringes a right to "refuse to deal" is also without merit.[17] It has long been settled that such a right is not immune from the police power of the state. *See, Nebbia v. New York,* 291 U.S. 502,

[15] *See,* George Benz Sons, Inc. v. Ericson, 227 Minn. 1, 34 N.W.2d 725 (1948); Paron v. City of Shakopee, 226 Minn. 222, 32 N.W.2d 603 (1948). *See generally,* Giozza v. Tiernan, 148 U.S. 657 (1893); Malito v. Marcin, 14 Ill. App. 3d 658, 303 N.E.2d 262 (1973), *appeal dismissed for want of a substantial federal question,* 417 U.S. 963 (1974).

In this regard, Minn. Stat. § 340.13, subd. 13 (1974), plainly sets forth the State's policy regarding the trade in intoxicating liquor:

> The legislature expressly reserves the right to limit or diminish the number of licenses, to limit the profits of any authorized manufacturer, wholesaler, or retailer as a condition to granting or continuing a license, and to regulate, limit, or prohibit the issuance or sale of capital stock in any licensee as a condition to granting a license.

[16] Thus, although not expressly challenged herein, the standing of the wholesaler-appellants to raise federal constitutional issues is highly questionable. That party which most clearly had standing, National Distillers & Chemical Corporation, an importer, has dismissed its appeal herein. In this same regard, the Act does not *require* importers to offer their products to Minnesota wholesalers. Thus, there is no merit to the assertion that Chapter 664 creates "compulsory franchises."

[17] It is important to note here, as we have done throughout these proceedings, that none of the appellant-wholesalers have standing to assert this claim. Chapter 664 does not affect the ability of wholesalers to choose the suppliers with which they deal. The Act merely requires that licensed *importers* offer their products for sale equally to all wholesalers.



523 (1934); *Advance-Rumely Thresher Co. v. Jackson,* 287 U.S. 283, 288 (1932).[18]

In essence, both of the above-discussed arguments (as well as many of the others raised by appellants) are invitations to the Court to resurrect the doctrine of substantive due process in the area of state economic regulation and thereby ". . . re-enter a constitutional thicket abandoned by the federal courts over three decades ago. . . ." *Baxley v. Alabama Dairy Commission,* 360 F. Supp. 1159, 1161 (M.D. Ala. 1973) (three-judge court). This invitation is made notwithstanding the Court's repeated admonitions that it does not sit in review of the economic wisdom or utility of state laws and that the economic policy of a particular state is a matter to be determined by its legislature. *See e.g., North Dakota State Board of Pharmacy v. Snyder's Drug Stores,* 414 U.S. 156 (1973); *Ferguson v. Skrupa,* 372 U.S. 726 (1963); *Day-Brite Lighting, Inc. v. State of Missouri,* 342 U.S. 421 (1952); *Olsen v. State of Nebraska,* 313 U.S. 236 (1941). These principles, thoroughly ignored by appellants, further establish the unsubstantiality of their due process arguments.[19]

[18] Appellants' reliance upon antitrust theories in opposition to the legality of Chapter 664 is clearly misplaced. The Act does not depend for its validity on any pre-existing law. It is a police measure to be judged on its own merit. Were the business practices the Act is designed to prevent violations of pre-existing law, enactment of the Act would have been unnecessary.

[19] Keystone Collection Service Inc. v. Recio, 389 F. Supp. 164 (D.P.R. 1975) is illustrative of the modern law of substantive economic due process. There, plaintiffs challenged the Puerto Rican "Christmas Bonus Law" which required employers to provide qualified employees with a yearly bonus based on a percentage of salary (subject, however, to a specified monetary limit). The statute was challenged on due process grounds and the district court was requested to convene a three-judge tribunal. The court, however, refused and dismissed the complaint, holding that no substantial federal question as to the validity of the statute had been presented.

### 3. Other Due Process Claims.

Appellants assert that the interpretation given Chapter 664 by the Minnesota Supreme Court has rendered the Act unconstitutionally vague.[20] It is further argued by two of the appellants herein that the decision below constitutes an unlawful delegation to the Minnesota Liquor Control Commission of the power to define standards of criminal conduct.[21]

These arguments are apparently based upon a single footnote[22] to the Court's opinion which merely states the truism that even though the Act is constitutional on its face, it cannot be improperly applied through invalid regulations.[23] That admonition did create any new "exceptions" to the Act's provisions. It is obvious that the court's footnoted comments regarding "irrebuttable presumptions" were in answer to appellants' various arguments that beneficient motives may underlie a particular refusal to sell to a wholesaler. The court pointed out that many, if not all, of the alleged "justifications" forwarded by appellants were independent violations of law and cause for the removal of a wholesaler's license.[24]

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[20] As appellants note, violations of the Act are subject to criminal sanctions. Minn. Stat. § 340.19 (1974).

[21] Heaven Hill Jurisdictional Statement at 50.

[22] Federal Distillers, Inc. v. State, —— Minn. ——, 229 N.W.2d 144, n. 20 at 160; Appendix to Griggs, Cooper Jurisdictional Statement at A-50.

[23] Since enforcement of the Act was stayed through the time of the Minnesota Supreme Court decision, the Court was passing only upon its facial constitutionality. *Cf.* Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35, 41 (1966). As of this date, the Liquor Control Commissioner has not yet issued any regulations pursuant to Chapter 664.

[24] *See e.g.*, Minn. Stat. § 325.04 (1974) (prohibiting sales below cost with intent to injure competitor or destroy competition); Minn. Stat. § 340.141 (1974) (prohibiting the sale of refilled liquor bottles); Minn. Stat. § 340.142 (1974) (prohibiting dilution or other tampering with the contents of an original liquor bottle or package).



In sum, there is no merit to the argument that appellants are forced to "guess" at what conduct is expected of them as a result of the provisions of Chapter 664. The decision of the Minnesota Supreme Court holding the Act to be constitutional on its face simply does not place appellants in the position of ignorance which they have contrived for this Court.

## C. CHAPTER 664 IS NOT VIOLATIVE OF THE EQUAL PROTECTION CLAUSE.

Appellants make two arguments in support of the contention that Chapter 664 denies them equal protection of the laws. First, they assert that the exclusion of wine and malt beverages from the Act's reach amounts to a denial of equal protection. Second, they claim that owners of "private labels" are placed in a preferred position under Chapter 664, also in violation of the Equal Protection Clause. Neither argument presents a substantial federal question to the Court.

### 1. The Exclusion of Wines and Malt Beverages From the Operation of Chapter 664 Is Wholly Proper.

This Court has enunciated specific guidelines to be applied in determining the validity under the Equal Protection Clause of a particular legislative classification. When applied to the present case, those principles establish the validity of the legislative distinction between wines and malt beverages on the one hand and intoxicating liquors on the other.

It is clear that legislative bodies are not required by the Equal Protection Clause to address either all or none of the problems in a particular area.

The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the

> same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. [Citation omitted.] Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. [Citation omitted.] The legislature may select one phase of one field and apply a remedy there, neglecting the others. [Citation omitted.]

*Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 489 (1955). *See also, Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608 (1935). In addition, "[a] statute is not invalid under the Constitution because it might have gone farther than it did. . . ." *Roschen v. Ward*, 279 U.S. 337, 339 (1929). Finally, in areas of economic regulation, the Equal Protection Clause prohibits only invidious discrimination, *Ferguson v. Skrupa*, 372 U.S. 726 (1963), and accordingly, does not require things which are different in fact or opinion to be treated in like manner. *Tigner v. State of Texas*, 310 U.S. 141 (1940).

In light of the foregoing, the legislative distinction between intoxicating liquor and wine and malt beverages is clearly valid. There are approximately 210 wholesale beer distributors in Minnesota,[25] 23 wholesalers which deal in wine (which includes each of the appellant-wholesalers herein),[26] and only 10 active wholesalers which distribute distilled spirits. Plainly, it was not only permissible but eminently reasonable for the legislature first to establish a competitive atmosphere within the aspect of the wholesale liquor industry wherein the

[25] Appendix to Griggs, Cooper Jurisdictional Statement at A-58.
[26] *Id.* at A-58. Each of the ten licensed wholesalers doing business prior to the enactment of the Act are licensed to wholesale wine as well as distilled spirits.



competitive problem was most acute. Thus, the distilled spirits market, having the least number of wholesalers and therefore the greatest potentiality for competitive abuse, was the logical first step in regulation.

The Minnesota Legislature was not required to take more than the "first step" it did by the enactment of Chapter 664. *Williamson v. Lee Optical of Oklahoma, supra; American Federation of Labor v. American Sash & Door Co.*, 335 U.S. 538, 541-542 (1949). It is plain that the classification of which appellants complain is a rational one, well within the permissible sphere of legislative definition.

### 2. The So-Called "Private Brand" Distinction.

One of the appellants asserts that the Act is deficient under the Equal Protection Clause because, in its view, the Act places Minnesota wholesalers which distribute "private-brand" liquor in a favored position *vis a vis* wholesalers which do not own private labels.[27] That argument was not even reached by the Minnesota Supreme Court and, in any event, has no merit.

Appellees have never asserted, nor did the court below hold, that private brands as such are exempt from the Act. It is clear under the Act that all *liquor* sold by an importer to one Minnesota wholesaler must be sold to all licensed wholesalers. In the case where the importer labels liquor with a brand label owned by a wholesaler, the importer can hardly be forced to sell the *label* to the other wholesalers—since it is not his to sell. However, the *product* contained in *unlabeled* bottles—which is his—must be sold to all other wholesalers, who are free to develop their own line of labels. Thus, *all* wholesalers are treated equally under Chapter 664 and the "private label" question raises no doubt whatever of the Act's validity.

[27] Griggs, Cooper Jurisdictional Statement at 27.

### D. SUMMARY.

Chapter 664 is a valid police regulation over the importation of intoxicating liquor into the State of Minnesota. It was enacted to correct a situation determined by the legislature to be inimical to the public welfare and legitimate means were chosen to accomplish the legislative goal. At base, this appeal is merely a disguised challenge to the economic policies adopted by the legislature and the arguments appellants have presented are more appropriately addressed to that body. In light of the Court's prior decisions, no substantial federal question has been raised by this appeal and plenary consideration of this matter is unnecessary.

## CONCLUSION

For the reasons set forth herein, this Court should grant appellees' motion to dismiss this appeal or, in the alternative, affirm the decision of the Minnesota Supreme Court.

Respectfully submitted,

WARREN SPANNAUS
Attorney General
State of Minnesota
PETER W. SIPKINS
Solicitor General
160 State Office Building
St. Paul, Minnesota 55155
Telephone: (612) 296-2961
*Attorneys for Appellees*